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AUG 9 1982
ALEXANDER L. STEVAS,
CLERK

82-224 No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3486,
Petitioner,

v.

NEW JERSEY AIR NATIONAL GUARD, 177th FIGHTER INTERCEPTOR GROUP and DEPARTMENT OF DEFENSE,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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August 9, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Whether a labor organization representing National Guard Technicians pursuant to the Federal Service Labor-Management Relations Statute (5 U.S.C. § 7101 *et seq.*) may negotiate the inclusion of grievance, and adverse action procedures culminating in binding arbitration within a collective bargaining agreement with the New Jersey Air National Guard regardless of any provisions in the National Guard Technician Act (32 U.S.C. § 709).*

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* All the parties in the United States Court of Appeals for the Third Circuit are listed in the caption with the exception of the Federal Labor Relations Authority (FLRA). The FLRA is an administrative agency of the federal government, the decision of which is the subject of this action. Petitioner intervened on behalf of the FLRA before the Court of Appeals. The Adjutants General Association and the Commonwealth of Pennsylvania, Pennsylvania National Guard were allowed to participate as amici before the Court of Appeals.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PRELIMINARY STATEMENT

Petitioner American Federation of Government Employees, AFL-CIO, Local 3483 prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit entered in *New Jersey Air National Guard, 177th Fighter Interceptor Group and Department of Defense v. Federal Labor Relations Authority*, 677 F.2d 276 (3rd Cir. 1982) on April 21, 1981, and that court's denial, on May 11, 1982, of petitioner's request for rehearing *en banc*.

OPINIONS BELOW

The decision and order of the Federal Labor Relations Authority, No. O-NG-119, is reported at 5 FLRA No. 26 (February 20, 1981).[1] The opinion of the Court of Appeals for the Third Circuit is reported at 677 F.2d 276 (3rd Cir. 1982).[2] Judgment was entered April 12, 1982.[3] Intervenor filed a timely motion for reconsideration and reconsideration *en banc* which was denied by the Court of Appeals on May 11, 1982.[4]

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on April 12, 1982. A timely petition for rehearing *en banc* was denied May 11, 1982, and the petition for certiorari has been filed within 90 days of the denial of reconsideration.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves Title VII of the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978), which is styled the Federal Service Labor-Management Relations Statute, 5 U.S.C. § 7101 *et seq.* (hereinafter "Statute")[5] and the National Guard Technicians Act of 1968, Pub. L. No. 90-486, 82 Stat. 755 (1968), 32 U.S.C. § 709 (hereinafter "Technician Act").[6]

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[1] Appendix A at 1a-8a (hereinafter "Pet. App." followed by the appropriate letter and page number(s)).

[2] Pet. App. B at 9a-30a.

[3] Pet. App. C at 31a-32a.

[4] Pet. App. D at 33a-34a.

[5] Pet. App. E at 35a-87a.

[6] Pet. App. F at 88a-90a.

STATEMENT OF THE CASE

Petitioner, American Federation of Government Employees, AFL-CIO, Local 3486 (hereinafter Union) is a labor union representing National Guard technicians in the New Jersey Air National Guard (hereinafter "Guard" or "management").

During the course of negotiating a collective bargaining agreement, the Guard refused to bargain on several union contract proposals concerning conditions of employment of National Guard technicians: reduction-in-force,[7] grievance of employees, and adverse disciplinary actions against technicians by the Guard.[8]

The Federal Labor Relations Authority (hereinafter FLRA) is an agency of the federal government created by Congress,[9] a duty of which is to decide questions concerning the negotiability of contract provisions[10] offered in collective bargaining in the federal sector.

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[7] The reduction-in-force proposal is not at issue in this Petition.

[8] The union proposals at issue read, in full:

Grievance Procedure

Section 4. An aggrieved employee affected by discrimination, removal, reduction in grade or pay based on an unacceptable performance or any other adverse action may raise the matter under any statutory appellant [sic] procedure or *with the concurrence of the union* under the negotiated procedure but not both; *except for a discrimination complaint which may be a mixed procedure and filed under both processes.*

Section 4(b). The parties agree that the grievance procedure negotiated herein (Article XI) may be used to adjudicate any misunderstanding or disagreement relating to "just cause" and what is considered "fair and equitable."

The italicized portions were held by the FLRA to be non-negotiable and are not at issue in this petition.

[9] 5 U.S.C. § 7104. Pet. App. E at 45a-46a.

[10] 5 U.S.C. § 7105. Pet. App. E at 46a-50a.

The question of negotiability of the union proposals was submitted to the FLRA pursuant to 5 U.S.C. § 7117(c).

The FLRA [11] ruled in favor of the union and ordered the Guard to engage in collective bargaining over the disputed proposals.

The Guard petitioned the U.S. Court of Appeals for review of the FLRA decision pursuant to jurisdiction granted the Court by 5 U.S.C. § 7123(a). The FLRA filed a cross-petition for enforcement via 5 U.S.C. § 7123 (b). American Federation of Government Employees, AFL-CIO, Local 3486, was permitted to join as an intervenor in the action before the Court of Appeals.

The court held [12] that the National Guard Technician Act of 1968, 32 U.S.C. § 709, rather than the Labor-Management Relations Chapter of the Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135 governed the case at bar. The court granted the Guard's petition for review, set aside the decision of the FLRA and denied the FLRA's cross-petition for enforcement.[13] Judgment issued April 12, 1982.[14]

Intervenor filed a timely motion for reconsideration and motion for reconsideration *en banc* which was denied by the court on May 11, 1982.[15]

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[11] *American Federation of Government Employees, AFL-CIO, Local 3486 and New Jersey Air National Guard, 177th Fighter Interceptor Group*, 5 FLRA No. 26 (1981) (Hereinafter *AFGE v. NJ Air Guard*), Pet-App. A. at 7a-8a.

[12] *New Jersey Air National Guard, 177th Fighter Interceptor Group and Department of Defense v. Federal Labor Relations Authority*, 677 F.2d 276 (3rd Cir. 1982) (hereinafter *NJ Air National Guard*). Pet. App. B at 9a-30a.

[13] *Id.* at 286. Pet. App. B at 30a.

[14] Pet. App. C at 31a-32a.

[15] Pet. App. D at 33a-34a.

REASONS FOR GRANTING PETITION

In establishing a system of labor-management relations for the federal service, Congress intended to provide a means for labor and management to bargain collectively over conditions affecting employment.[16]

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[16] Section 3 of the Civil Service Reform Act, *Findings and Statement of Purpose*, provided that certain rights of federal employees should be expressly recognized by statute. In relevant part Section 3 states:

> It is the policy of the United States that—
>
> . . . (10) the right of Federal employees to organize, bargain collectively, and participate through labor organizations in decisions which affect them, with full regard for the public interest and the effective conduct of public business, should be specifically recognized in statute.

5 U.S.C.A. § 1101 note.

This basic purpose of the statute and the underlying findings are set forth in Section 7101:

> The Congress finds that—
>
> (1) experience in both private and public employment indicates that the statutory protection of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—
>
> (A) safeguards the public interest,
>
> (B) contributes to the effective conduct of public business, and
>
> (C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and
>
> (2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.
>
> Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

Section 7101(a) Pet. App. E at 36a-37a.

The purpose of the statute is "to *prescribe certain rights* and obligations *of the employees of the Federal Government* and to establish procedures which are designed to meet the special re-

The FLRA is the federal agency created by Congress to enforce the terms of the Civil Service Reform Act.[17]

National Guard technicians are civilians, numbering approximately 42,000[18], who perform a wide range of administrative, clerical, educational and technical tasks as federal employees pursuant to 32 U.S.C. § 709.[19]

> The National Guard Technician Act of 1968 was a congressional response to problems stemming from the ambiguous employment status of full time civilian technicians who served in National Guard units throughout the country. They performed such essential and varied services as maintenance of equipment and facilities, training, support of aircraft operations, and clerical functions. Although these technicians, formerly called caretakers and clerks, had been paid by the Federal government, most were required to hold concurrent National Guard membership as a condition of employment, and were considered State employees.
>
> Before the Act's passage, no uniform national program for the retirement and fringe benefits had been established. Moreover, the uncertain legal status of the technicians led to conflicting court decisions in third party action claims against the government. The Technicians Act gave the civilians Federal employee status. To clarify supervisory functions, Adjutant Generals [sic], although State officers, were

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quirements and needs of the Government." Section 7101(b), [Emphasis supplied] Pet. App. E at 37a.

Fundamental to the specified employee rights is the right "to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees. . . ." Section 7102(2), Pet. App. E at 38a.

[17] 5 U.S.C. §§ 7105, 7117. Pet. App. E at 46a-50a, 65a-69a.

[18] S. Rep. No. 1448, 90th Cong., 2d Sess. 2 (1968).

[19] 32 U.S.C. § 709. Pet. App. F at 88a-90a.

> made responsible for the technicians employment and termination of service. [Emphasis added] [20]

The FLRA's administration decision in this case [21] argues persuasively and correctly, that 5 U.S.C. § 7121 [22] and 32 U.S.C. § 709(e) [23] can coexist.

The FLRA correctly relies upon 5 U.S.C. § 7121(e)(1) [24] which acknowledges the preexistence of statutory and regulatory appeal systems throughout the varied federal sector. 5 U.S.C. § 7121 grants the employee the option of using the various agencies' appeal procedures (be they statutorily created or regulatory) or the negotiated grievance procedure.

The FLRA cites the guidance set forth in the legislative history of 5 U.S.C. § 7121(e):

> Subsection (e) provides employees with an option, in appealing matters covered under 5 U.S.C. Section 4303 (demotion or removal for unacceptable performance) or 5 U.S.C. Section 7512 (removal, suspension for more than 30 days, reduction-in-grade, reduction in pay of an amount exceeding one step of an employee's grade or 3 percent of the employee's base pay, furlough of thirty days or less), or using the statutory appeal procedure if such matters have been negotiated into the coverage under the grievance procedure. It also provides that matters similar to

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[20] *DiLuigi v. Kafkalis*, 584 F.2d 22 at 24 (3rd Cir. 1978).

[21] *AFGE v. NJ Air Guard*, supra note 11, at p. 4, Pet. App. A at 4a-6a. Citing as controlling *National Association of Government Employees R12-132 and California National Guard*, 5 FLRA No. 25 (1981) at pp. 3-7 (hereinafter *NAGE* R12-132). Pet. App. G at 94a-100a.

[22] Pet. App. E at 77a-80a.

[23] Pet. App. E at 83a-89a.

[24] Pet. App. E at 79a-80a.

those listed above which may arise under other personnel systems applicable to employees covered by this subchapter, such as those provided in Title 38, United States Code, may, in the discretion of the aggrieved employee, be raised under either the negotiated grievance procedure or under any appellate procedures which would otherwise be available to the employee if the matter weren't covered by the grievance procedure. S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978) *reprinted in* [1978] U.S. Code *Congressional Administrative News*, 2723, 2832.[36]

The Senate Report is illuminating in its use of Title 38 (Veterans Administration) as an example of an in-place procedure for discipline or removal of federal employees. 38 U.S.C. § 4110(d)[37] provides that the decision of the Veterans Administration Medical Director ". . . shall be final. . . ." The Senate Report acknowledges the existence of statutes that grant ultimate, nonreviewable discretion in disciplinary and other matters in an agency official. The Senate Report, however, specifically states that the nonreviewable discretion of an agency official, though specifically authorized by statute, is no bar to the use of the negotiated grievance procedure authorized by 5 U.S.C. § 7121(e).

The FLRA correctly rejected the Guard's contention that negotiated grievance procedures ending in binding arbitration would violate the provisions of 32 U.S.C. § 709(e)(5) and correctly stated that 5 U.S.C. § 7121 provides for an *alternative* procedure for grievances.[37]

The Court of Appeals found that National Guard technicians are within the coverage of the Civil Service Re-

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[36] *NAGE R12-122*, supra note 21, at p. 6. Pet. App. G at 98a-99a.

[37] 38 U.S.C. § 4110. Pet. App. H at 102a.

[37] *NAGE, R12-122*, supra note 21, at 6-7. Pet. App. G at 100a.

form Act.[29] It concluded, however, that § 709(e) of the National Guard Technician Act of 1968,[30] by committing the matters contained in the union proposals at issue herein "to the administratively unreviewable discretion of the Adjutant General commanding each state National Guard unit"[30] precluded bargaining on such proposals. The court determined that it could not apply the applicable provisions of the Labor-Management Act to National Guard Technicians without, in the court's opinion, effectively repealing § 709(e) of the National Guard Technician Act. The court held, after an analysis of the legislative history of the Technician Act and from the absence of any specific reference to either the Technician Act or technicians in the legislative history of the Labor-Management Act, that "Congress intended the Technician Act, rather than the Labor-Management Act, to govern in this situation."[31] The court held that "the requirements of § 7121 of the Labor-Management Act do not override the provisions of Section 709(e) of the Technician Act."[32]

The court rejected the FLRA's contention that 5 U.S.C. § 7121(e)(1) allows the establishment of alternative procedures for adverse action appeals.

> This outcome, however, rests upon a premise with which we cannot agree: that the Technician Act merely creates a *procedure* for handling grievances. Nothing in section 709(e) sets out vehicles or guidelines by which grievances can be resolved, or creates

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[29] "The Act makes no reference whatsoever to the National Guard or National Guard technicians and *the technicians therefor fall within the implicit coverage of the act.*" [Emphasis added] *NJ Air National Guard, supra* note 12, at p. 281. Pet. App. B at 19a.

[30] 32 U.S.C. § 709(e). Pet. App. F at 88a-89a.

[30] *NJ Air National Guard, supra* note 12, at p. 277. Pet. App. B at 11a.

[31] Ibid. at pp. 277-78. Pet. App. B at 11a.

[32] Ibid, p. 286. Pet. App. B at 29a.

anything that could fairly be termed a "statutory procedure" within the meaning of the Labor-Management Act. Instead, and quite plainly, section 709(e) imposes a *limit* on procedures: it establishes only that a dispute over one of the enumerated matters, whatever procedural route it may take, must terminate, finally, with the decision of the adjutant general. The "accommodation" posited by the FLRA—a negotiated procedure, which may reject the adjutant general's final decision, as an alternative to a statute limiting grievance procedures to that final decision—therefore, is no accommodation at all; rather, it is a negation of the Technician Act.[23]

Even if the Court of Appeals is correct in stating that § 709(e) of the Technician Act does not create a statutory appeal procedure, this fact is not determinative of the applicability of 5 U.S.C. § 7121(e) to technicians or the Technician Act. In this connection, 5 U.S.C. § 7121(e) refers to matters arising under other personnel systems applicable to employees covered by the Labor-Management Act, rather than of matters subject to another statutory appeal procedure. 5 U.S.C. § 7121(e)[24] states that employees subject to other personnel systems have the option of raising these matters by utilizing the negotiated grievance-arbitration procedures or "the appellate procedures, *if any*, applicable to those matters."

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[23] Ibid., at p. 282. Pet. B at 21a-22a.

[24] 5 U.S.C. § 7121

(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage

* * * * *

(e)(1) Matters covered under sections 4303 and 7512 of this title which all fall within the coverage of the negotiated griev-

The Court of Appeals, through its interpretation of the National Guard Technician Act (32 U.S.C. § 709(e)) [28] eviscerates the later enacted 5 U.S.C. § 7121(e).

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ance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, *if any*, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first. (Emphasis added.) 5 U.S.C. § 7121. Pet. App. E at 79a-80a.

[28] 32 USC § 709. Technicians: employment, use, status

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

32 U.S.C. § 709 set out in full Pet. App. F at 88a-89a.

The FLRA's decision in this case should have been granted deference by the Court of Appeals pursuant to 5 U.S.C. § 7123 and 5 U.S.C. § 706.

By not according the administrative decision of the FLRA due deference in this case, the Court of Appeals invites balkanization of federal sector labor relations. This result is in direct contravention of the Congressional mandate found in 5 U.S.C. § 7105(a) for a single authoritative voice in collective bargaining in the federal government; that voice being the FLRA.

The Court of Appeals justifies its lack of deference to the FLRA decision by asserting that the FLRA's decision rests not upon the interpretation of the Labor-Management Act but rather the FLRA's attempted interpretation of an Act outside its competence, the National Guard Technicians Act, 5 U.S.C. § 709.[26]

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[26] The FLRA asserts that because it was charged by Congress with the responsibility of construing and implementing the Labor-Management Act, we must defer to its interpretation of that Act "'unless there are compelling indications that it is wrong.'" *Department of Defense, Army-Air Force Exch. Serv. v. Federal Labor Relations Auth.*, 659 F.2d 1140, 1161-62 (D.C. Cir. 1981); (*quoting Miller v. Youakim*, 440 U.S. 125, 145 n.25, 99 S.Ct. 957, 969 n.25, 59 L.Ed.2d 194 (1979)). In this case, however, we are not faced only with a question of construing the Labor-Management Act. Rather, we must resolve an apparent conflict between that Act and the Technician Act. While we place considerable weight on the interpretation of the Labor-Management Act rendered by the FLRA, we are not obliged to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the two statutes. *Cf. Teosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981) (Secretary of Health, Education and Welfare's construction of agency regulations "is not entitled to special deference to the extent that it rests on the interpretation of another agency's statutes and regulations").

NJ Air Guard, *supra* note 12 p. 281 n.6; Pet. App. B at 20a.

This decision by the Court of Appeals not to grant deference to the FLRA in a decision concerning negotiability on contract proposals is contrary to the decisions of other courts which have considered like questions.

The District of Columbia Circuit in deciding one of the first cases under the new Statute ruled that great deference should be given to the decisions of the FLRA on questions of negotiability.

> "Under the circumstances presented by this case, we believe that the FLRA's decision concerning Proposals [regarding issues of negotiability] must be upheld. We begin with the recognition that courts must yield great deference to an interpretation of a statute by the agency entrusted with its administration. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-434 (1971); *United States v. City of Chicago*, 400 U.S. 8, 10 (1970); *Udall v. Tallman*, 380 U.S. 1, 4 (1965). "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" *Power Reactor Development Co. v. Int'l Union of Elec., Radio & Machine Wkrs*, 367 U.S. 396, 408 (1961), quoting *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933), in turn quoted in *Nat'l Federation of Federal Employees v. FLRA*, *supra*, [652] F.2d at [198], slip opinion at 3-4, and in *Udall v. Tallman*, *supra*, 380 U.S. at 16. The surface ambiguity of the central statutory distinction provides a further reason for us to defer to the considered judgment of the Authority. As we explained above, the task of distinguishing negotiable procedures from management's reserved substantive authority involves questions of judgment and balance, about which reasonable people could easily differ. *And Congress intended the needed judgments to be made, not by this court, but by the Au-*

thority. "To sustain the Commission's application of [a] statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, 153 (1946), quoted in *Udall v. Tallman*, *supra*, 380 U.S. at 16. As the Supreme Court has stated repeatedly, "[T]he construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979), quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969) (footnote omitted); see *Board of Gov. of Federal Reserve System v. First Lincolnwood Corp.*, 439 U.S. 234, 251 (1978); *Zemel v. Rusk*, 381 U.S. 1, 11-12 (1965). (Emphasis added.) [27]

If the Court grants certiorari and determines the merits of the Court of Appeals' decision overturning the FLRA's administrative decision, the Court would have the opportunity to provide crucial guidance on the interpretation of the new Labor-Management Statute. The Court would also have the opportunity to definitively decide the authority of the FLRA to interpret the Labor-Management Relations Act, specifically instances when the Act interrelates with other statutes. Finally, the Court would provide crucial guidance on the right of 42,000 National Guard technicians to collectively bargain the conditions of their employment as intended by Congress.

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[27] *Dept. of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140, 1161-62 (D.C. Cir. 1981). Cf. *Bureau of Alcohol, Tobacco and Firearms v. Federal Labor Relations Authority*, 672 F.2d 732 (9th Cir. 1982) (FLRA unfair labor practice finding); *Internal Revenue Service v. Federal Labor Relations Authority*, 671 F.2d 560 (D.C. Cir. 1982) (FLRA unfair labor practice finding).

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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82-224

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August 9, 1982

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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APPENDIX A

5 FLRA No. 26

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-119

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3486,
Union

and

NEW JERSEY AIR NATIONAL GUARD,
177TH FIGHTER INTERCEPTOR GROUP,
POMONA, NEW JERSEY
Activity

DECISION AND ORDER ON NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101, *et seq.*).

A dispute arose between the parties as to the negotiability of the following three proposals:

Union Proposals

Reduction-In-Force

Section 8. An employee will be permitted to grieve any violation of this Article under the disputes provision of this contract.

Grievance Procedure

Section 4. An aggrieved employee affected by discrimination, removal, reduction in grade or pay based on an unacceptable performance or any other adverse action may raise the matter under any statutory appellant (sic) procedure or *with the concurrence of the union* under the negotiated procedure but not both; *except for a discrimination complaint which may be a mixed procedure and filed under both processes.* [underscoring added.]

Adverse Disciplinary Action

Section 4(b) The parties agree that the grievance procedure negotiated herein (Article XI) may be used to adjudicate any misunderstanding or disagreement relating to "just cause" and what is considered "fair and equitable".

Question Here Before the Authority

The question is whether the Union's proposals, which essentially pertain to the scope and coverage of the negotiated grievance procedure, are matters outside the duty to bargain under section 7117 of the Statute because they are inconsistent with Federal Law (32 U.S.C. § 709(e))[1] and the Statute, as alleged by the Agency.

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[1] Section 709(e) of the National Guard Technicians Act of 1968, 32 U.S.C. § 709(e) (1970) provides as follows:

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of

Opinion

Conclusion and Order: The Union's proposals concern matters which are within the duty to bargain under the Statute, although certain portions thereof (underscored above) are inconsistent with the Statute. Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10, *as amended by* 45 Fed. Reg. 48,575 (1980)), IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the subject proposals entitled "Reduction-in-Force" and "Adverse Disciplinary Action" in their entirety and the one entitled "Grievance Procedure" to the extent indicated herein.[2]

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employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

[2] In deciding that portions of the Union's proposals are within the duty to bargain, the Authority makes no judgment as to the merits of said proposals.

Reasons: As noted above, the Agency alleges that 32 U.S.C. § 709(e) precludes negotiations over those portions of the Union's proposals which would include within the scope of the negotiated grievance procedure matters such as reductions-in-force, reductions in grade or pay based on unacceptable performance, or any other adverse action involving National Guard technicians. Specifically, the Agency alleges the appeals of such actions cannot by law extend beyond the adjutant general of the jurisdiction concerned. For the same reason, the Agency further alleges, adjudication of such terms as "just cause" and "fair and equitable" as they are applied to adverse disciplinary actions imposed by the adjutant general would be contrary to 32 U.S.C. § 709(e) since any ruling by an arbitrator with regard to such terms would infringe on the exercise of the adjutant general's authority in such matters.

These proposals which essentially pertain to the scope and coverage of the negotiated grievance procedure bear no material difference from the disputed proposal which was before the Authority in *National Association of Government Employees, Local R12-122 and California National Guard*, 5 FLRA No. 25 (1980), and which was held to be within the duty to bargain under the Statute. In that case, the Authority determined the proposed grievance procedure which included within its coverage matters relating to appeals of adverse actions involving National Guard technicians was within the duty to bargain under section 717 of the Statute.[3] Therefore, based on the reasons set forth in greater detail in *California National Guard*, the proposals here in dispute, except to the extent specified below, must also be held to be within the duty to bargain under the Statute.

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[3] *See also, American Federation of Government Employees, Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis, Minnesota*, 4 FLRA No. 58 (1980).

The portion of the Union's proposal entitled "Grievance Procedure" which would permit the filing of a discrimination complaint under both a statutory appeal procedure and the negotiated grievance procedure is nonnegotiable inasmuch as the Statute precludes an employee so affected from utilizing both procedures, but instead requires the employee to elect one procedure or the other.

Section 7121(d) of the Statute provides, in pertinent part, as follows:

> (d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. . . .

By the express language of section 7121(d), it is clear that an employee affected by a discrimination matter as defined in 5 U.S.C. § 2302(b)(1),[4] which matter also falls

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[4] 5 U.S.C. § 2302(b)(1) provides as follows:

§ 2302. *Prohibited personnel practices*

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—

(1) discriminate for or against any employee or applicant for employment—

(A) on the basis of race, color, religion, sex, or national origin, as prohibited under section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16);

(B) on the basis of age, as prohibited under sections 12 and 15 of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 631, 633a);

(C) on the basis of sex, as prohibited under section 6(d) of the Fair Labor Standards Act of 1938 (29 U.S.C. 206(d));

[Footnote continued on page 6a]

under the coverage of a negotiated grievance procedure, may raise the matter under *either* a statutory appeal procedure *or* the negotiated procedure, but may not raise the matter under both procedures. The legislative history in this regard indicates that the language of section 7121(d) of the Statute as enacted and signed into law is identical to that contained in section 7221(f) of the bill (S. 2640) reported out of the Senate Committee on Governmental Affairs and subsequently passed by the Senate. The Senate Committee reported on this subsection, in pertinent part, as follows: [5]

> Where the negotiated procedure covers . . . discrimination complaints, under section . . . 7221(f) the employee will have an option to use the negotiated grievance procedure or the statutory appeal procedure, but not both.

Accordingly, while it is clearly negotiable to include discrimination matters as set forth in 5 U.S.C. § 2302(b)(1) within the scope of negotiated grievance procedures,[6] to the extent that the Union's proposal in the instant case would permit an employee to pursue "a discrimination complaint . . . under both processes," the proposal conflicts with section 7121(d) of the Statute and is, therefore, outside the duty to bargain.

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[4] [Continued]

> (D) on the basis of handicapping condition, as prohibited under section 501 of the Rehabilitation Act of 1973 (29 U.S.C. 791); or
>
> (E) on the basis of marital status or political affiliation, as prohibited under any law, rule, or regulation. . . .

[5] S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978).

[6] *See*, in this regard, *National Treasury Employees Union and Internal Revenue Service*, 3 FLRA No. 112 (1980), wherein the Authority held, in part, that a proposal which sought to incorporate the provisions of 5 U.S.C. § 2302(b) into the negotiated grievance procedure was within the duty to bargain under the Statute.

Furthermore, as the Agency contends, if the intent of the proposed "Grievance Procedure" were to require an aggrieved employee to obtain the concurrence of the Union prior to the initiation of a grievance, then the proposal would conflict with section 7121(b)(3)(B) of the Statute[7] and would therefore be outside the duty to bargain. The Union, in its response to the Agency's statement of position, stated, in this regard, that, "the language was not intended to deprive any employee[s] of their rights under the [S]tatute [but] was proposed with the intent that only the union may invoke arbitration." However, the proposal states that "an aggrieved employee affected by discrimination . . . may raise the matter . . . with the concurrence of the union under the negotiated procedure." Thus, on its face, the proposal would require concurrence of the Union prior to the filing of a *grievance*. To that extent, the proposal is inconsistent with section 7121(b)(3)(B) of the Statute which guarantees to employees the right to present grievances on their own behalf and is, therefore, outside the duty to bargain.

In summary, the proposals entitled "Reduction-In-Force" and "Adverse Disciplinary Action," in their entirety, and the proposal entitled "Grievance Procedure," except as specified herein, are within the Agency's duty to bargain under section 7117 of the Statute. Accord-

---

[7] Section 7121(b)(3)(B) of the Statute provides as follows:

§ 7121. *Grievance procedures*

. . . . . .

(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

. . . . . .

(3) include procedures that—

. . . . . .

(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding. . . .

ingly, the Agency's allegations that the Union's proposals are not within the duty to bargain are, to that extent, set aside.

Issued, Washington, D.C., February 20, 1981

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Chairman

/s/ Henry B. Frazier III
HENRY B. FRAZIER III, Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, Member

Federal Labor Relations Authority

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1592

NEW JERSEY AIR NATIONAL GUARD,
177TH FIGHTER INTERCEPTOR GROUP
and DEPARTMENT OF DEFENSE,
Petitioners

v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO, LOCAL 3486,
Intervenor

ON PETITION FOR REVIEW FROM, AND
CROSS-APPLICATION FOR ENFORCEMENT OF, AN
ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY

FLRA No. 0-NG-119, 5 FLRA No. 26

Argued February 19, 1982

Before: ADAMS and SLOVITER, *Circuit Judges*,
and STERN, *District Judge* *

(Filed April 12, 1982)

---

* Hon. Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

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OPINION OF THE COURT

ADAMS, *Circuit Judge.*

On this appeal from an order of the Federal Labor Relations Authority (FLRA) we must decide whether the New Jersey Air National Guard is obliged to bargain over certain conditions of employment with a union representing National Guard technicians. The FLRA held that the Labor-Management Relations Chapter of the Civil Service Reform Act of 1978 (hereinafter referred to as the "Labor-Management Act"), 5 U.S.C. §§ 7101-7135 (Supp. IV 1980), required the Guard to bargain. The Guard insists that it is precluded from bargaining over the conditions in question by the National Guard Technician Act of 1968 (hereinafter the "Technician Act"), 32 U.S.C. § 709 (1976), which commits these matters to the administratively unreviewable discretion of the adjutant general commanding each state's National Guard units. Because we conclude that Congress intended the Technician Act, rather than the Labor-Management Act, to govern this situation, we grant the Guard's petition for review, set aside the decision of the FLRA, and deny the FLRA's cross-petition for enforcement.

I

Although this case arises in a statutory framework that is somewhat complex, the facts that give rise to the dispute are uncontested and fairly straightforward.

In 1979, the Guard was engaged in collective bargaining with Local 3486 of the American Federation of Government Employees, AFL-CIO (AFGE). Local 3486 represents civilian technicians working for the Guard's 177th Fighter Interceptor Group. In the course of the negotiations, the parties reached an impasse with respect to several issues bearing on the employment of those technicians: provisions in the collective bargaining agreement for reductions-in-force, grievances by employees, and ad-

verse disciplinary actions by the Guard.[1] The Guard contended that it was unable to bargain over those provisions because they go to matters that are committed by the Technician Act to the discretion of the adjutant general of the New Jersey National Guard. Local 3486 maintained that these matters nevertheless fell within the scope of subjects that must, under the Labor-Management Act, be negotiated. The Guard held to its position, and Local 3486 brought a grievance before the FLRA—the agency charged with implementing the Labor-Management Act and overseeing disputes between the federal government and its employees.

In its order of February 20, 1981, the FLRA decided in favor of Local 3486. The agency held that Congress, when it enacted the Labor-Management Act ten years after the Technician Act, intended the later statute to

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[1] The union proposals at issue read, in full:

Reduction-In-Force

> *Section 3.* An employee will be permitted to grieve any violation of this Article under the disputes provision of this contract.

Grievance Procedure

> *Section 4.* An aggrieved employee affected by discrimination, removal, reduction in grade or pay based on an unacceptable performance or any other adverse action may raise the matter under any statutory appellant [sic] procedure or with the concurrence of the union under the negotiated procedure but not both; except for a discrimination complaint which may be a mixed procedure and filed under both processes.

Adverse Disciplinary Action

> *Section 4(b).* The parties agree that the grievance procedure negotiated herein (Article XI) may be used to adjudicate any misunderstanding or disagreement relating to "just cause" and what is considered "fair and equitable."

American Federation of Government Employees, AFL-CIO, Local 3486 and New Jersey Air National Guard, 177th Fighter Interceptor Group, 5 F.L.R.A. No. 26, slip op. at 1-2 (Feb. 20, 1981).

override the Technician Act to the extent that the two were in conflict, and meant to provide Guard technicians with collective bargaining rights even with respect to matters that had previously been within the administratively unreviewable discretion of the adjutant general. Accordingly, the FLRA ordered the Guard to engage in collective bargaining over the disputed matters. The Guard petitioned this Court for review pursuant to 5 U.S.C. § 7123(a), and the FLRA filed a cross-petition for enforcement under 5 U.S.C. § 7123(b). Local 3486 was permitted to join as an intervenor in the action.

II

The National Guard occupies a unique position in the federal structure. It is "an essential reserve component of the Armed Forces of the United States, available with regular forces in time of war," and "also may be federalized in addition to its role under state governments, to assist in controlling civil disorders." *Gilligan v. Morgan*, 413 U.S. 1, 7 (1973). As the successor to the state militias of the nation's early years, *see Maryland v. United States*, 381 U.S. 41 (1965), the Guard fills a role recognized and provided for in the United States Constitution. Art. I, § 8, cl. 16; amend. II. This role does not fit neatly within the scope of either state or national concerns; historically the Guard has been, and today remains, something of a hybrid. Within each state the National Guard is a state agency, under state authority and control. At the same time, the activity, makeup, and function of the Guard is provided for, to a large extent, by federal law.

Mirroring this special posture of the Guard is the *sui generis* status of its employees. In addition to purely military personnel, the Guard employs civilians to perform a wide range of administrative, clerical, and technical tasks. Often the responsibilities and duties of these employees, who are generally referred to as National

Guard technicians, correspond directly to those of other civilian employees, yet they arise in a distinctly military context, implicating significant military concerns. *See, e.g., NeSmith v. Fulton*, 615 F.2d 196, 201 (5th Cir. 1980).

To accommodate the civilian interests of these employees without intruding on the Guard's military and security needs, and to recognize by statute the special employee status that had evolved informally, Congress in 1968 enacted the National Guard Technician Act, 32 U.S.C. § 709. In that Act, all Guard technicians, who had previously been employees of the states, were declared to be federal employees, and were thereby afforded the benefits and rights generally provided for federal employees in the civil service. 32 U.S.C. § 709(d).[2] The Act imposed special reservations to that federal civilian employee status, however. Specifically, Guard technicians were required to serve simultaneously as members of the National Guard, *id.* at § 709(b), and technicians who perform operational duties at air defense sites were subjected to some requirements of irregular additional duty beyond the ordinary workday schedule, *id.* at § 709(g). In addition, the Act set out a number of conditions of employment, relating to the discipline and discharge of Guard technicians, that were to remain within the final discretion of the adjutants general of the various state National Guards. In particular, the Act provided:

> Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

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[2] This federal employee status was intended primarily to ensure that National Guard technicians would have a retirement and benefit program that was "both uniform and adequate," and to bring technicians within the coverage of the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1976), regarding third party actions against the United States. S. Rep. No. 1446, 90th Cong., 2d Sess. 1-8 (1968); *DiLuigi v. Kafkalas*, 584 F.2d 22, 24 (3d Cir. 1978), *cert. denied*, 440 U.S. 959 (1979).

(C) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) *a right of appeal* which may exist with respect to clause (1), (2), (3), or (4) *shall not extend beyond the adjutant general of the jurisdiction concerned;* and

(6) a technician shall be notified in writing of the termination of his employment as a techni-

> cian and such notification shall be given at least thirty days prior to the termination date of such employment.

[emphasis added]. *Id.* § 709(e).

Under the statutory scheme of section 709(e)—disregarding for the moment any subsequent federal statute that might modify or supersede it in some way—it is clear that the Guard is not obliged to bargain over the matters disputed here. For example, one issue in contention is whether there must be a procedure consisting of binding arbitration, by which an aggrieved employee can challenge an adverse disciplinary action. Section 709(e)(3) provides that the adjutant general may, "at any time," remove a technician from his technician employment "for cause," and section 709(e)(5) precludes any administrative appeal extending beyond the adjutant general.[8] This plain language unmistakably forecloses any obligation on the part of the Guard to arbitrate dismissals for cause, either before the decision to dismiss is reached, when such a requirement would contravene section 709(e)(3), or as an appeal procedure following a decision to dismiss, when an arbitration requirement would violate 709(e)(5). The statutory provisions of section 709(e) are equally clear with respect to the other disputed subjects of bargaining: reductions in force and disciplinary actions other than discharge are explicity committed to the discretion of the adjutant general by section 709(e)(4).

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[8] Although section 709(e)(5) has been read to preclude *administrative* appeals, it should be noted that this Court has not construed this provision to foreclose *judicial* review of decisions committed to the discretion of the adjutant general. *See Claudeis v. Atkinson*, 494 F.2d 1323, 1328-29 n.5 (3d Cir. 1974). *See generally Tennessee v. Dunlop*, 426 U.S. 312 (1976).

III

The FLRA and Local 3486 argue that whether or not the Technician Act, standing alone, would preclude a requirement that the Guard negotiate over procedures for dismissals for cause, adverse disciplinary actions, and the other matters in dispute, the subsequent Labor-Management Act superseded the Technician Act and imposed such a requirement. The Labor-Management Act was enacted as part of the comprehensive Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978). The objectives of the Reform Act, were, in part, to improve labor-management relations in the federal sector, protect legitimate rights of federal employees, and increase the efficiency of the federal government. *See* H.R. Rep. No. 95-1403, 95th Cong., 2d Sess. 3 (1978). To some extent the Reform Act codified institutions and practices that previously had been governed by executive order, but modified those existing practices substantially.[4] One such change was the creation of the FLRA, an agency intended to supervise federal labor-management relations and play a role similar to that performed by the National Labor Relations Board in the private sector. *See id.* at 41; *National Federation of Federal Employees, Local 1263 v. Commandant, Defense Language Institute, West Coast Branch*, 493 F. Supp. 675, 680 (N.D. Cal. 1980).

As one of the central features of the Reform Act, the Labor-Management Act sets out a collective bargaining system for federal employees. Under this system, the federal government and unions representing federal employees are obliged to bargain in good faith over the conditions of employment in order to reach a collective bargaining agreement. Exempted from the mandatory sub-

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[4] *See* Executive Order 11491, 3 C.F.R. 861 (1966-1970 compilation), *reprinted in* 5 U.S.C. § 7101 (Supp. IV 1980). *See generally* Comment, *Federal Sector Arbitration Under the Civil Service Reform Act of 1978*, 17 San Diego L. Rev. 857 (1980).

jects of bargaining are matters relating to prohibited political activity or the classification of any position, and matters "specifically provided for by Federal statute." 5 U.S.C. § 7103(12) & (14). In addition, bargaining is not required where it would be inconsistent with government-wide rules or regulations, or with agency regulations deemed by the FLRA to fill a "compelling need." *Id.* § 7117(a). The FLRA is charged with the responsibility for determining whether or not a specific matter falls within the duty to bargain in good faith, *see id.* § 7117(c), and for resolving other issues relating to the duty to bargain, *see id.* § 7105(a)(3)(E).

Beyond this general requirement that the parties negotiate over the conditions of employment, the Labor-Management Act provides that "any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability." *Id.* § 7121(a)(1). These procedures must be fair, simple, and expeditious, and must furnish the employees and the exclusive bargaining representative with an opportunity to present their case during the proceeding. The procedure also must provide for binding arbitration to resolve any grievance not settled to the satisfaction of both parties. *Id.* § 7121(b). Either party may take exception to an arbitration award and obtain review by the FLRA. *Id.* § 7122.

In negotiating the collective bargaining agreement, the parties may agree to exclude matters from the grievance procedure, and the statute itself exempts several types of grievances from coverage by the procedure: violations of statutory provisions regarding political activities, retirement, health insurance, or life insurance matters, suspensions or removals for national security reasons, and the classification of any position that does not result in the reduction in grade or pay of an employee. *Id.* at § 7121(b)-(c). In the case of grievances covered by procedures set out in other statutes, the aggrieved em-

ployee may raise his complaint under either the negotiated procedure or the procedure set forth in the other statute. *Id.* at § 7121(d)-(e). Where an employee has selected the negotiated procedure over the alternative statutory procedure, review by the FLRA under section 7122 is foreclosed. *Id.* § 7121(f).

The Act also contains a "management rights" provision which provides, in part, that the Act does not affect the authority of a management official

> to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees.

5 U.S.C. § 7106(a)(2)(A). This provision is qualified, however: it does not preclude the negotiation of "procedures which management officials of the agency will observe in exercising any authority under this section." *Id.* § 7106(b)(1). *See generally Department of Defense, Army-Air Force Exchange Service v. Federal Labor Relations Authority*, 659 F.2d 1140 (D.C. Cir. 1981).

Exempted from the coverage of the Act are the employees of several federal agencies: the General Accounting Office, the Federal Bureau of Investigation, the Central Intelligence Agency, the National Security Agency, the Tennessee Valley Authority, the Federal Labor Relations Authority, and the Federal Service Impasses Panel. *Id.* § 7103(a)(3). The Act makes no reference whatsoever to the National Guard or National Guard technicians, and the technicians therefore fall within the implicit coverage of the Act.[5]

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[5] The Act extends to employees of "Executive agenc[ies]." 5 U.S.C. § 7103(a)(2)-(3). The Technician Act establishes Guard technicians as employees of the Department of the Army or the Department of the Air Force—both executive agencies. 32 U.S.C. § 709(d).

IV

With these two statutes—the Technician Act and the Labor-Management Act—now set out, we proceed to consider the issue before us on appeal: whether the Technician Act continues to prohibit appeals from certain decisions of the state adjutant general despite the provisions of the Labor-Management Act, which would ordinarily require the establishment of procedures for such appeals.[6]

As in any case involving a question of statutory interpretation, our burden here is to give full effect to the congressional intent, as reflected in the legislation. To do so properly we must attempt to harmonize the two statutes that are in apparent conflict. "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). *See also United States v. Borden Co.*, 308 U.S. 188, 198 (1939).

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[6] The FLRA asserts that because it was charged by Congress with the responsibility of construing and implementing the Labor-Management Act, we must defer to its interpretation of that Act "'unless there are compelling indications that it is wrong.'" *Department of Defense, Army-Air Force Exch. Serv. v. Federal Labor Relations Auth.*, 659 F.2d 1140, 1161-62 (D.C. Cir. 1981) (*quoting Miller v. Youakim*, 440 U.S. 125, 145 n.25 (1979)). In this case, however, we are not faced only with a question of construing the Labor-Management Act. Rather, we must resolve an apparent conflict between that Act and the Technician Act. While we place considerable weight on the interpretation of the Labor-Management Act rendered by the FLRA, we are not obliged to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the two statutes. *Cf. Tsosie v. Califano*, 651 F.2d 719, 722 (10th Cir. 1981) (Secretary of Health, Education and Welfare's construction of agency regulations "is not entitled to special deference to the extent that it rests on the interpretation of another agency's statutes and regulations").

Section 709(e)(5) of the Technician Act cuts off any appeal from a decision by an adjutant general on one of the enumerated matters. Section 7121 of the Labor-Management Act, in contrast, would, if applicable to Guard technicians, require arbitration of those matters even after the adjutant general, or a subordinate acting with the authority of the adjutant general, has made a final decision with respect to, for example, an adverse disciplinary action. The procedure would thus provide complainants with an opportunity to seek reversal of the adjutant general's decisions. In short, the Labor-Management Act creates an appeal procedure—precisely the procedure forbidden by the Technician Act.

The FLRA nevertheless has concluded that the two statutes can be harmonized if they are seen as creating alternative routes—the chain of command leading to the adjutant general on the one hand and the negotiated grievance procedure on the other—by which a grievant can raise his claims. *See National Association of Government Employees, Local R12-132 and California National Guard* 5 F.L.R.A. No. 25, slip op. at 6-7 (Feb. 20, 1981). As the FLRA observed, such an accommodation would appear to satisfy the dictates of the Labor-Management Act, which provide that existing statutory grievance procedures should remain as an alternative to the negotiated procedures. *See* 5 U.S.C. § 7121(e)(1). This outcome, however, rests upon a premise with which we cannot agree: that the Technician Act merely creates a *procedure* for handling grievances. Nothing in section 709(e) sets out vehicles or guidelines by which grievances can be resolved, or creates anything that could fairly be termed a "statutory procedure" within the meaning of the Labor-Management Act. Instead, and quite plainly, section 709(e) imposes a *limit* on procedures: it establishes only that a dispute over one of the enumerated matters, whatever procedural route it may take, must terminate, finally, with the decision of the adjutant general. The "accommodation" posited by the

FLRA—a negotiated procedure, which may reject the adjutant general's final decision, as an alternative to a statute limiting grievance procedures to that final decision—therefore, is no accommodation at all; rather, it is a negation of the Technician Act.

Before acceding to such a negation, we must determine whether any other accommodation of the two statutory provisions is possible. Specifically, we must decide whether Congress intended to retain the Technician Act as a narrow exception to the Labor-Management Act, preserving the procedural limitations of section 709(e) for Guard technicians. *Cf. Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (employment preference for Indians within Bureau of Indian Affairs, specifically provided for in 1934 statute, remains as implicit exception to the more general requirements of the Equal Opportunity Act of 1972, 42 U.S.C. § 2000e *et seq.*); *Wright v. Alabama Army National Guard*, 437 F. Supp. 54 (M.D. Ala. 1977) (Technician Act constitutes specific exception to subsequent Fair Labor Standards Act, 29 U.S.C. § 207); *aff'd* 605 F.2d 943 (5th Cir. 1979) (per curiam). In essence, our aim is to ascertain whether Congress intended the specific provisions of the 1968 Technician Act or the more general provisions of the 1978 Labor-Management Act to govern the availability of grievance procedures to Guard technicians. In doing so, we are guided by the language of the statutes themselves, the legislative history underlying each Act, and the apparent or inferrable purposes that each Act reflects.

Looking first to the statutory language, we immediately confront the preface to section 709(e) of the Technician Act, which explicitly provides that its terms apply *"Notwithstanding any other provision of law . . ."* [emphasis added]. A clearer statement is difficult to imagine: section 709(e) must be read to override any conflicting provision of law in existence at the time that the Technician Act was enacted. Application of this statement is

less certain, however, with respect to a statute such as the Labor-Management Act, adopted *after* the Technician Act. The drafters of section 709(e) can hardly be said to have had the Labor-Management Act specifically within their contemplation. Even so, the preemptive language is powerful evidence that Congress did not intend any other, more general, legislation, whenever enacted, to qualify the authority of the state adjutants general as set out in the Technician Act. The language does not preclude a subsequent change of heart on the part of Congress, but it does suggest that any qualification of the terms of section 709(e) would be accepted by Congress only after some consideration of the factors requiring or permitting such a change.

Unlike the Technician Act, the Labor-Management Act does not contain any explicit language overriding all statutes with which it may conflict. Quite to the contrary, the Act in several sections explicity defers to existing laws where they conflict with the Act: the duty to bargain itself applies only "to the extent not inconsistent with any federal law or any government-wide rule or regulation." 5 U.S.C. § 7117(a)(1); *see id.* § 7103(a)(14)(C). This explicit exemption may not extend to the duty, set out in a separate section, to negotiate a grievance procedure,[7] but again it constitutes some indication of the importance attached by Congress to the specific terms of the Labor-Management Act in relation to other, overlapping statutes. In the case of the Labor-Management Act, unlike that of the Technician Act, the statutory language provides some room for the accommodation of competing legislative purposes.

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[7] 5 U.S.C. § 7121(a), which imposes the duty to bargain over grievance procedures, augments the more general duty to bargain set out in § 7117(a)(1), and therefore may be interpreted to apply even in circumsances where § 7117(a)(1) would not otherwise require bargaining.

Because the language in the preface to section 709(e) of the Technicians Act is not conclusive, we turn to the legislative history of the two enactments for further guidance. That history, like the statutes themselves, suggests that Congress intended the Technician Act—and not other legislation such as the Labor-Management Act—to govern the employment status of National Guard technicians.

In the history of the Technician Act, and in particular in the history of the specific provision declaring technicians to be federal employees, we find abundant evidence of serious congressional concern with ensuring the final authority of state adjutants general. In 1968, Congress was reacting to a situation in which National Guard technicians were considered state employees and consequently were not assured of uniform treatment with respect to fringe benefits or retirement plans. In addition, it was unclear whether acts of those employees could serve as the basis for an action against the United States under the Federal Tort Claims Act, 28 U.S.C. §§ 1346, 2671-2680 (1976). To remedy the situation, Congress declared technicians to be federal employees. In agreeing to that new status, however, the Senate Committee on Armed Services expressed serious concern with protecting the military authority of the states, and in particular the state adjutants general, over elements of technician employment that implicated military, as opposed to purely civilian concerns. To accommodate the need for some control by the state military, federal employee status was carefully hinged upon the reservations set out in section 709(e) of certain powers to the state adjutants general. In its report, the Committee stated:

> This bill implements the purpose [of the legislation] by converting the technicians to Federal employee status with certain controls on administration and supervision which would as a matter of law remain at the State level. In effect, the technicians will be-

> come Federal employees receiving the salaries, fringe and retirement benefits, but with certain administrative control regarding employment supervision remaining with the adjutants general of the jurisdiction concerned under regulations prescribed by the Secretary concerned.

S. Rep. No. 1446, 90th Cong. 2d Sess. 2 (1968). In virtually the same breath as it approved the status of technicians as federal employees, the Committee stated its intention to preserve state military authority over a limited number of crucial matters. The controls it recommended were clearly central to the legislation, and reflected an understanding on the part of the Committee that such controls were critical to the military purpose of the Guard:

> The technicians, . . . numbering about 42,000, constitute only about 8 percent of the total drill paid strength of approximately 500,000 members of the National Guard. In order that there be some degree of supervision and control at the State level of all National Guardsmen, including technicians in their dual status, the Committee feels *it is essential that the controls enumerated be provided as a matter of law.* Otherwise, there would be varying rules and regulations applying to guardsmen who were technicians as compared to the remaining personnel who are also a part of the National Guard program.

Id. at 14-15 [emphasis added].

In light of this vigorous congressional statement of concern regarding the retention of certain state controls, it appears most plausible that Congress would have refused to grant federal employee status to the technicians without simultaneously reserving to the states that limited, but nevertheless crucial, control. From this perspective, section 709(e), which ensures the authority of the state adjutants general, can be viewed as a virtual

quid pro quo for the section 709(d) grant of federal employee status. This symbiotic relationship between the two provisions suggests that a court should be extremely reluctant to expand the scope of one of the two provisions so as to cancel out the other.

Yet, in effect, this is precisely what the FLRA would have us do. Because, under section 709(d), Guard technicians are now federal agency employees, they are within the scope of the Labor-Management Act. *See* 5 U.S.C. § 7103(a)(2)-(3). Because they are encompassed by that Act, the FLRA argues, the section 709(e) restrictions in effect no longer apply—at least to the negotiated procedures required under that Act. But the legislative history of the Technician Act makes it quite doubtful that Congress in 1968 had such an eventuality in mind when it made technicians federal employees. Rather, it appears quite clear from the importance Congress attached to the preservation of state control that, at least in 1968, it intended to bring Guard technicians within the coverage of schemes such as the Labor-Management Act only with the provision that the state controls set out in section 709(e) would remain.

Congress, of course, remains free to change its mind. Nothing in the Technician Act precludes a subsequent Congress from determining that the provisions of section 709(e), previously deemed "essential" to the preservation of state supervision and control over the Guard, are no longer necessary or appropriate. If the manifest intent of the Labor-Management Act were to repeal or modify the provisions of section 709(e), we would, perforce, give effect to that decision. Here, however, we are faced with no specific mention of either the Technician Act or technicians in the legislative history of the Labor-Management Act. There is no reference to the unique state-federal status of those employees; no recognition of any military aspects to the employment of National Guard technicians. In short, we can find no evidence

whatsoever that Congress in 1978 had within its contemplation the employment status of National Guard technicians.[8]

Although the general language of the Labor-Management Act might nevertheless be taken to override, *sub silentio*, the special provisions of the Technician Act, repeals by implication generally are not favored. *Morton v. Mancari*, 417 U.S. 535, 549-51 (1974). As the Supreme Court stated in *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 153 (1976), "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum." The *Radzanower* Court took note of the long-standing approval for this rule:

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[8] The FLRA asks us to infer congressional consideration of the effect the Labor-Management Act would have on the status of National Guard technicians from the contemporaneous consideration by Congress of a separate bill, having to do with the membership of military personnel in labor organizations. Pub. L. No. 95-610, 92 Stat. 3085 (1978), codified at 10 U.S.C. § 976 (Supp. IV 1980). The legislative history behind that enactment reveals specific congressional attention to the concerns attending the employment of National Guard technicians. *See* H.R. Rep. No. 95-894, 95th Cong., 2d Sess. (1978), *reprinted at* [1978] U.S. Code Cong. & Ad. News 7575. We have no doubt that, as the FLRA suggests, Congress was "aware" of the Technician Act in 1978. We are reluctant, however, to assume from legislative attention to Guard technicians in another context that Congress, in enacting the Labor-Management Act, took into account any effect the Act would have upon the Technician Act. Quite to the contrary, the legislative history with respect to the military labor organization bill—legislation that had a more obvious impact on the status of Guard technicians—provides an example of the attention that one would expect to find if Congress had intended to modify the provisions of the Technician Act. The history of the military labor organization bill constitutes additional evidence that Congress, even in 1978, considered the status of National Guard technicians to be of sufficient consequence to merit discussion and careful consideration before being modified.

> The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general manner, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.

426 U.S. at 153, (quoting T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874)). *See also Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). To be sure, difficult questions of statutory interpretation ought not to be decided by the bland invocation of abstract jurisprudential maxims. *See, e.g., United States v. Universal C.I.T. Credit Corporation*, 344 U.S. 218, 221 (1952). But even when they are not determinative, accepted rules of statutory construction can provide helpful guidance in uncovering the most likely intent of Congress.

A preference for the specific over the general statute makes considerable sense in the situation we confront here. Congress in 1968 turned its attention to the very class of federal employees involved in this dispute. It crafted with care precise provisions intended to meet concerns of federalism and military control that are duplicated nowhere else in the federal service. Legislators in 1968 stressed the importance of the provisions in question to the entire scheme of National Guard employment. One can only infer from this narrowly directed activity that Congress, upon consideration of the issue in dispute here—the right of appeal by a Guard technician—decided that very matter, with explicit and specific language, in 1968. Turning to the 1978 legislation, we are met with a statute addressing the employment concerns of all federal employees—none of whom, with the exception of Na-

tional Guard technicians, performs military roles under the supervision of state officials. It appears inconceivable that Congress in 1978, without a moment's thought as to the question of state control over the National Guard, or as to the needs of military discipline over Guard technicians in their dual status as civilian and military personnel, intended to eliminate, by mere implication, the controls that Congress carefully had imposed over those employees and deemed "essential" ten years earlier.

Because such a conclusion appears unwarranted by anything contained in the statutes themselves or the legislative histories accompanying them, we must reject the position of the FLRA and hold that the provisions of section 709(e) of the Technician Act remain as exceptions to the terms of the Labor-Management Act. Only this reading of the two statutes successfully gives to both statutes the effect evidently intended by Congress. The tightly focused military concerns reflected in the Technician Act remain satisfied; the more diffuse concerns with the employment status and rights of federal employees are satisfied in their entirety with respect to all but a small percentage of those employees, and satisfied in large part even with respect to that remainder, the National Guard technicians. It bears emphasis that, under the Labor-Management Act, the Guard still must engage in collective bargaining with a union representing Guard technicians: the dispute here is not over coverage by the Act, but over the applicability of a few, concededly important, provisions of the Act. Because we cannot apply those general provisions to Guard technicians without in effect repealing section 709(e) of the Technician Act, and because it is abundantly clear that Congress deemed section 709(e) to be of considerable importance to the proper functioning of the National Guard as a military unit under dual state-federal control, we hold that the requirements of section 7121 of the Labor-Management Act do not override the provisions of section 709(e) of the Technician Act. To do otherwise

would permit a subtle subversion of a clear congressional intent.

V

The petition for review will be granted, the decision of the FLRA will be set aside, and the FLRA's petition for cross-enforcement will be denied.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1592

NEW JERSEY AIR NATIONAL GUARD,
177th FIGHTER INTERCEPTOR GROUP and
DEPARTMENT OF DEFENSE,
Petitioners

vs.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO,
Intervenor

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF AN ORDER OF THE FEDERAL LABOR RELATIONS AUTHORITY
(FLRA No. O-NG-119, 5 FLRA No. 26)

Present: ADAMS and SLOVITER, *Circuit Judges and* STERN, *District Judge* *

JUDGMENT

This cause came on to be heard on the record from the Federal Labor Relations Authority and was argued by counsel on February 19, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the Guard's petition for review be, and the same is hereby granted and the Au-

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* Honorable Herbert J. Stern, United States District Judge for the District of New Jersey, sitting by designation.

thority's cross-application for enforcement is hereby denied. It is further ordered and adjudged that the order of the said Authority issued February 20, 1981, be and the same is hereby set aside in accordance with the opinion of this Court. Costs taxed against respondent.

ATTEST:

/s/ M. Elizabeth Ferguson
Chief Deputy Clerk

April 12, 1982

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 81-1592

NEW JERSEY AIR NATIONAL GUARD,
177th FIGHTER INTERCEPTOR GROUP
v.

DEPARTMENT OF DEFENSE,
Petitioners
v.

FEDERAL LABOR RELATIONS AUTHORITY,
Respondent
and

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES,
AFL-CIO (AFGE), LOCAL 3486,
Intervenor

SUR PETITION FOR REHEARING EN BANC

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and STERN, *District Judge.**

The petition for rehearing filed by Intervenor in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the

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* Hon. Herbert J. Stern, U.S. District Court for the District of New Jersey, sitting by designation.

circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court

/s/ [Illegible]
Circuit Judge

Dated: May 11, 1982

APPENDIX E

THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE

(Chapter 71 of Title 5 of the U.S. Code)

"Subpart F—Labor-Management and Employee Relations
"Chapter 71—Labor-Management Relations

"SUBCHAPTER I—GENERAL PROVISIONS

"Sec.

"7101. Findings and purpose.
"7102. Employees' rights.
"7103. Definitions; application.
"7104. Federal Labor Relations Authority.
"7105. Powers and duties of the Authority.
"7106. Management rights.

"SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

"Sec.

"7111. Exclusive recognition of labor organizations.
"7112. Determination of appropriate units for labor organization representation.

"7113. National consultation rights.
"7114. Representation rights and duties.
"7115. Allotments to representatives.
"7116. Unfair labor practices.
"7117. Duty to bargain in good faith; compelling need; duty to consult.
"7118. Prevention of unfair labor practices.
"7119. Negotiation impasses; Federal Service Impasses Panel.
"7120. Standards of conduct for labor organizations.

"SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

"Sec.

"7121. Grievance procedures.
"7122. Exceptions to arbitral awards.
"7123. Judicial review; enforcement.

"SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

"Sec.

"7131. Official time.
"7132. Subpenas.
"7133. Compilation and publication of data.
"7134. Regulations.
"7135. Continuation of existing laws, recognitions, agreements, and procedures.

"SUBCHAPTER I—GENERAL PROVISIONS

"§ 7101. Findings and purpose

"(a) The Congress finds that—

"(1) Experience in both private and public employment indicates that the statutory protec-

tion of the right of employees to organize, bargain collectively, and participate through labor organizations of their own choosing in decisions which affect them—

"(A) safeguards the public interest,

"(B) contributes to the effective conduct of public business, and

"(C) facilitates and encourages the amicable settlements of disputes between employees and their employers involving conditions of employment; and

"(2) the public interest demands the highest standards of employee performance and the continued development and implementation of modern and progressive work practices to facilitate and improve employee performance and the efficient accomplishment of the operations of the Government.

Therefore, labor organizations and collective bargaining in the civil service are in the public interest.

"(b) It is the purpose of this chapter to prescribe certain rights and obligations of the employees of the Federal Government and to establish procedures which are designed to meet the special requirements and needs of the Government. The provisions of this chapter should be interpreted in a manner consistent with the requirement of an effective and efficient Government.

"§ 7102. Employees' rights

"Each employee shall have the right to form, join, or assist any labor organization, or to refrain from any such activity, freely and without fear of penalty or reprisal, and each employee shall be protected in the exercise of such right. Except as otherwise pro-

vided under this chapter, such right includes the right—

"(1) to act for a labor organization in the capacity of a representative and the right, in that capacity, to present the views of the labor organization to heads of agencies and other officials of the executive branch of the Government, the Congress, or other appropriate authorities, and

"(2) to engage in collective bargaining with respect to conditions of employment through representatives chosen by employees under this chapter.

"§ 7103. Definitions; application

"(a) For the purpose of this chapter—

"(1) 'person' means an individual, labor organization, or agency;

"(2) 'employee' means an individual—

"(A) employed in any agency; or

"(B) whose employment in an agency has ceased because of any unfair labor practice under section 7116 of this title and who has not obtained any other regular and substantially equivalent employment, as determinded under regulations prescribed by the Federal Labor Relations Authority;

but does not include—

"(i) an alien or noncitizen of the United States who occupies a position outside the United States;

"(ii) a member of the uniformed services;

"(iii) a supervisor or a management official;

"(iv) an officer or employee in the Foreign Service of the United States employed in the Department of State, the Agency for International Development, or the International Communication Agency; or

"(v) any person who participates in a strike in violation of section 7311 of this title;

"(3) 'agency' means an Executive agency (including a nonappropriated fund instrumentality described in section 2105(c) of this title and the Veterans' Canteen Service, Veterans' Administration), the Library of Congress, and the Government Printing Office, but does not include—

"(A) the General Accounting Office;

"(B) the Federal Bureau of Investigation;

"(C) the General Intelligence Agency;

"(D) the National Security Agency;

"(E) the Tennessee Valley Authority;

"(F) the Federal Labor Relations Authority; or

"(G) the Federal Service Impasses Panel;

"(4) 'labor organization' means an organization composed in whole or in part of employees, in which employees participate and pay dues, and which has as a purpose the dealing with an

agency concerning grievances and conditions of employment, but does not include—

"(A) an organization which, by its constitution, bylaws, tacit agreement among its members, or otherwise, denies membership because of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(B) an organization which advocates the overthrow of the constitutional form of government of the United States;

"(C) an organization sponsored by an agency; or

"(D) an organization which participates in the conduct of a strike against the Government or any agency thereof or imposes a duty or obligation to conduct, assist, or participate in such a strike;

"(5) 'dues' means dues, fees, and assessments;

"(6) 'Authority' means the Federal Labor Relations Authority described in section 7104(a) of this title;

"(7) 'Panel' means the Federal Service Impasses Panel described in section 7119(c) of this title;

"(8) 'collective bargaining agreement' means an agreement entered into as a result of collective bargaining pursuant to the provisions of this chapter;

"(9) 'grievance' means any complaint—

"(A) by any employee concerning any matter relating to the employment of the employee;

"(B) by any labor organization concerning any matter relating to the employment of any employee; or

"(C) by any employee, labor organization, or agency concerning—

"(i) the effect or interpretation, or a claim of breach, of a collective bargaining agreement; or

"(ii) any claimed violation, misinterpretation, or misapplication of any law, rule, or regulation affecting conditions of employment;

"(10) 'supervisor' means an individual employed by an agency having authority in the interest of the agency to hire, direct, assign, promote, reward, transfer, furlough, layoff, recall, suspend, discipline, or remove employees, to adjust their grievances, or to effectively recommend such action, if the exercise of the authority is not merely routine or clerical in nature but requires the consistent exercise of independent judgment, except that, with respect to any unit which includes firefighters or nurses, the term 'supervisor' includes only those individuals who devote a preponderance of their employment time to exercising such authority;

"(11) 'management official' means an individual employed by an agency in a position the duties and responsibilities of which require or authorize the individual to formulate, determine, or influence the policies of the agency;

"(12) 'collective bargaining' means the performance of the mutual obligation of the representative of an agency and the exclusive representative of employees in an appropriate unit

in the agency to meet at reasonable times and to consult and bargain in a good-faith effort to reach agreement with respect to the conditions of employment affecting such employees and to execute, if requested by either party, a written document incorporating any collective bargaining agreement reached, but the obligation referred to in this paragraph does not compel either party to agree to a proposal or to make a concession;

"(13) 'confidential employee' means an employee who acts in a confidential capacity with respect to an individual who formulates or effectuates management policies in the field of labor-management relations;

"(14) 'conditions of employment' means personnel policies, practices, and matters, whether established by rule, regulation, or otherwise, affecting working conditions, except that such term does not include policies, practices, and matters—

"(A) relating to political activities prohibited under subchapter III of chapter 73 of this title;

"(B) relating to the classification of any position; or

"(C) to the extent such matters are specifically provided for by Federal statute;

"(15) 'professional employee' means—

"(A) an employee engaged in the performance of work—

"(i) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual

instruction and study in an institution of higher learning or a hospital (as distinguished from knowledge acquired by a general academic education, or from an apprenticeship, or from training in the performance of routine mental, manual, mechanical, or physical activities);

"(ii) requiring the consistent exercise of discretion and judgment in its performance;

"(iii) which is predominantly intellectual and varied in character (as distinguished from routine mental, manual, mechanical, or physical work); and

"(iv) which is of such character that the output produced or the result accomplished by such work cannot be standardized in relation to a given period of time; or

"(B) an employee who has completed the courses of specialized intellectual instruction and study described in subparagraph (A)(i) of this paragraph and is performing related work under appropriate direction or guidance to qualify the employee as a professional employee described in subparagraph (A) of this paragraph;

"(16) 'exclusive representative' means any labor organization which—

"(A) is certified as the exclusive representative of employees in an appropriate unit pursuant to section 7111 of this title; or

"(B) was recognized by an agency immediately before the effective date of this chapter as the exclusive representative of employees in an appropriate unit—

"(i) on the basis of an election, or

"(ii) on any basis other than an election,

and continues to be so recognized in accordance with the provisions of this chapter;

"(17) 'firefighter' means any employee engaged in the performance of work directly connected with the control and extinguishment of fires or the maintenance and use of firefighting apparatus and equipment; and

"(18) 'United States' means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, the Trust Territory of the Pacific Islands, and any territory or possession of the United States.

"(b)(1) The President may issue an order excluding any agency or subdivision thereof from coverage under this chapter if the President determines that—

"(A) the agency or subdivision has as a primary function intelligence, counterintelligence, investigative, or national security work, and

"(B) the provisions of this chapter cannot be applied to that agency or subdivision in a manner consistent with national security requirements and considerations.

"(2) The President may issue an order suspending any provision of this chapter with

respect to any agency, installation, or activity located outside the 50 States and the District of Columbia, if the President determines that the suspension is necessary in the interest of national security.

"§ 7104. Federal Labor Relations Authority

"(a) The Federal Labor Relations Authority is composed of three members, not more than 2 of whom may be adherents of the same political party. No member shall engage in any other business or employment or hold another office or position in the Government of the United States except as otherwise provided by law.

"(b) Members of the Authority shall be appointed by the President by and with the advice and consent of the Senate, and may be removed by the President only upon notice and hearing and only for inefficiency, neglect of duty, or malfeasance in office. The President shall designate one member to serve as Chairman of the Authority.

"(c)(1) One of the original members of the Authority shall be appointed for a term of 1 year, one for a term of 3 years, and the Chairman for a term of 5 years. Thereafter, each member shall be appointed for a term of 5 years.

"(2) Notwithstanding paragraph (1) of this subsection, the term of any member shall not expire before the earlier of—

"(A) the date on which the member's successor takes office, or

"(B) the last day of the Congress beginning after the date on which the member's term of office would (but for this subparagraph) expire.

An individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced.

"(d) A vacancy in the Authority shall not impair the right of the remaining members to exercise all of the powers of the Authority.

"(e) The Authority shall make an annual report to the President for transmittal to the Congress which shall include information as to the cases it has heard and the decisions it has rendered.

"(f) (1) The General Counsel of the Authority shall be appointed by the President, by and with the advice and consent of the Senate, for a term of 5 years. The General Counsel may be removed at any time by the President. The General Counsel shall hold no other office or position in the Government of the United States except as provided by law.

"(2) The General Counsel may—

"(A) investigate alleged unfair labor practices under this chapter,

"(B) file and prosecute complaints under this chapter, and

"(C) exercise such other powers of the Authority as the Authority may prescribe.

"(3) The General Counsel shall have direct authority over, and responsibility for, all employees in the office of General Counsel, including employees of the General Counsel in the regional offices of the Authority.

"§ 7105. Powers and duties of the Authority

"(a) (1) The Authority shall provide leadership in establishing policies and guidance relating to matters under this chapter, and, except as otherwise pro-

vided, shall be responsible for carrying out the purpose of this chapter.

"(2) The Authority shall, to the extent provided in this chapter and in accordance with regulations prescribed by the Authority—

"(A) determine the appropriateness of units for labor organization representation under section 7112 of this title;

"(B) supervise or conduct elections to determine whether a labor organization has been selected as an exclusive representative by a majority of the employees in an appropriate unit and otherwise administer the provisions of section 7111 of this title relating to the according of exclusive recognition to labor organizations;

"(C) prescribe criteria and resolve issues relating to the granting of national consultation rights under section 7113 of this title;

"(D) prescribe criteria and resolve issues relating to determining compelling need for agency rules or regulations under section 7117(b) of this title;

"(E) resolves issues relating to the duty to bargain in good faith under section 7117(c) of this title;

"(F) prescribe criteria relating to the granting of consultation rights with respect to conditions of employment under section 7117(d) of this title;

"(G) conduct hearings and resolve complaints of unfair labor practices under section 7118 of this title;

"(H) resolve exceptions to arbitrator's awards under section 7122 of this title; and

"(I) take such other actions as are necessary and appropriate to effectively administer the provisions of this chapter.

"(b) The Authority shall adopt an official seal which shall be judicially noticed.

"(c) The principal office of the Authority shall be in or about the District of Columbia, but the Authority may meet and exercise any or all of its powers at any time or place. Except as otherwise expressly provided by law, the Authority may, by one or more of its members or by such agents as it may designate, make any appropriate inquiry necessary to carry out its duties wherever persons subject to this chapter are located. Any member who participates in the inquiry shall not be disqualified from later participating in a decision of the Authority in any case relating to the inquiry.

"(d) The Authority shall appoint an Executive Director and such regional directors, administrative law judges under section 3105 of this title, and other individuals as it may from time to time find necessary for the proper performance of its functions. The Authority may delegate to officers and employees appointed under this subsection authority to perform such duties and make such expenditures as may be necessary.

"(e) (1) The Authority may delegate to any regional director its authority under this chapter—

"(A) to determine whether a group of employees is an appropriate unit;

"(B) to conduct investigations and to provide for hearings;

"(C) to determine whether a question of representation exists and to direct an election; and

"(D) to supervise or conduct secret ballot elections and certify the results thereof.

"(2) The Authority may delegate to any administrative law judge appointed under subsection (d) of this section its authority under section 7118 of this title to determine whether any person has engaged in or is engaging in an unfair labor practice.

"(f) If the Authority delegates any authority to any regional director or administrative law judge to take any action pursuant to subsection (e) of this section, the Authority may, upon application by any interested person filed within 60 days after the date of the action, review such action, but the review shall not, unless specifically ordered by the Authority, operate as a stay of action. The Authority may affirm, modify, or reverse any action reviewed under this subsection. If the Authority does not undertake to grant review of the action under this subsection within 60 days after the later of—

"(1) the date of the action; or

"(2) the date of the filing of any application under this subsection for review of the action;

the action shall become the action of the Authority at the end of such 60-day period.

"(g) In order to carry out its functions under this chapter, the Authority may—

"(1) hold meetings;

"(2) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

"(3) may require an agency or a labor organization to cease and desist from violations of this chapter and require it to take any remedial action it considers appropriate to carry out the policies of this chapter.

"(h) Except as provided in section 518 of title 28, relating to litigation before the Supreme Court, attorneys designated by the Authority may appear for the Authority and represent the Authority in any civil action brought in connection with any function carried out by the Authority pursuant to this title or as otherwise authorized by law.

"(i) In the exercise of the functions of the Authority under this title, the Authority may request from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or policy directives issued by the Office of Personnel Management in connection with any matter before the Authority.

"§ 7106. Management rights

"(a) Subject to subsection (b) of this section, nothing in this chapter shall affect the authority of any management official of any agency—

"(1) to determine the mission, budget, organization, number of employees, and internal security practices of the agency; and

"(2) in accordance with applicable laws—

"(A) to hire, assign, direct, layoff, and retain employees in the agency, or to suspend, remove, reduce in grade or pay, or take other disciplinary action against such employees;

"(B) to assign work, to make determinations with respect to contracting out, and to determine the personnel by which agency operations shall be conducted;

"(C) with respect to filling positions, to make selections for appointments from—

"(i) among properly ranked and certified candidates for promotion; or

"(ii) any other appropriate source; and

"(D) to take whatever actions may be necessary to carry out the agency mission during emergencies.

"(b) Nothing in this section shall preclude any agency and any labor organization from negotiating—

"(1) at the election of the agency, on the numbers, types, and grades of employees or positions assigned to any organizational subdivision, work project, or tour of duty, or on the technology, methods, and means of performing work;

"(2) procedures which management officials of the agency will observe in exercising any authority under this section; or

"(3) appropriate arrangements for employees adversely affected by the exercise of any authority under this section by such management officials.

"SUBCHAPTER II—RIGHTS AND DUTIES OF AGENCIES AND LABOR ORGANIZATIONS

"§ 7111. Exclusive recognition of labor organizations

"(a) An agency shall accord exclusive recognition to a labor organization if the organization has been selected as the representative, in a secret ballot election, by a majority of the employees in an appropriate unit who cast valid ballots in the election.

"(b) If a petition is filed with the Authority—

"(1) by any person alleging—

"(A) in the case of an appropriate unit for which there is no exclusive representative, that 30 percent of the employees in the appropriate unit wish to be represented for the purpose of collective bargaining by an exclusive representative, or

"(B) in the case of an appropriate unit for which there is an exclusive representative, that 30 percent of the employees in the unit allege that the exclusive representative is no longer the representative of the majority of the employees in the unit; or

"(2) by any person seeking clarification of, or an amendment to, a certification then in effect or a matter relating to representation;

the Authority shall investigate the petition, and if it has reasonable cause to believe that a question of representation exists, it shall provide an opportunity for a hearing (for which a transcript shall be kept) after reasonable notice. If the Authority finds on the record of the hearing that a question of representation exists, the Authority shall supervise or conduct an election on the question by secret ballot and shall certify the results thereof. An election under this subsection shall not be conducted in any appropriate unit or in any subdivision thereof within which, in the preceding 12 calendar months, a valid election under this subsection has been held.

"(c) A labor organization which—

"(1) has been designated by at least 10 percent of the employees in the unit specified in any petition filed pursuant to subsection (b) of this section;

"(2) has submitted a valid copy of a current or recently expired collective bargaining agreement for the unit, or

"(3) has submitted other evidence that it is the exclusive representative of the employees involved;

may intervene with respect to a petition filed pursuant to subsection (b) of this section and shall be placed on the ballot of any election under such subsection (b) with respect to the petition.

"(d) The Authority shall determine who is eligible to vote in any election under this section and shall establish rules governing any such election, which shall include rules allowing employees eligible to vote the opportunity to choose—

"(1) from labor organizations on the ballot, that labor organization which the employees wish to have represent them; or

"(2) not to be represented by a labor organization.

In any election in which no choice on the ballot receives a majority of the votes cast, a runoff election shall be conducted between the two choices receiving the highest number of votes. A labor organization which receives the majority of the votes cast in an election shall be certified by the Authority as the exclusive representative.

"(e) A labor organization seeking exclusive recognition shall submit to the Authority and the agency involved a roster of its officers and representatives, a copy of its constitution and bylaws, and a statement of its objectives.

"(f) Exclusive recognition shall not be accorded to a labor organization—

"(1) if the Authority determines that the labor organization is subject to corrupt influences or influences opposed to democratic principles;

"(2) in the case of a petition filed pursuant to subsection (b) (1) (A) of this section, if there is not credible evidence that at least 30 percent of the employees in the unit specified in the petition wish to be represented for the purpose of collective bargaining by the labor organization seeking exclusive recognition;

"(3) if there is then in effect a lawful written collective bargaining agreement between the agency involved and an exclusive representative (other than the labor organization seeking exclusive recognition) covering any employees included in the unit specified in the petition, unless—

"(A) the collective bargaining agreement has been in effect for more than 3 years, or

"(B) the petition for exclusive recognition is filed not more than 105 days and not less than 60 days before the expiration date of the collective bargaining agreement; or

"(4) if the Authority has, within the previous 12 calendar months, conducted a secret ballot election for the unit described in any petition under this section and in such election a majority of the employees voting chose a labor organization for certification as the unit's exclusive representative.

"(g) Nothing in this section shall be construed to prohibit the waiving of hearings by stipulation

for the purpose of a consent election in conformity with regulations and rules or decisions of the Authority.

"§ 7112. Determination of appropriate units for labor organization representation

"(a) (1) The Authority shall determine the appropriateness of any unit. The Authority shall determine in each case whether, in order to ensure employees the fullest freedom in exercising the rights guaranteed under this chapter, the appropriate unit should be established on an agency, plant, installation, functional, or other basis and shall determine any unit to be an appropriate unit only if the determination will ensure a clear and identifiable community of interest among the employees in the unit and will promote effective dealings with, and efficiency of the operations of, the agency involved.

"(b) A unit shall not be determined to be appropriate under this section solely on the basis of the extent to which employees in the proposed unit have organized, nor shall a unit be determined to be appropriate if it includes—

"(1) except as provided under section 7135 (a) (2) of this title, any management official or supervisor;

"(2) a confidential employee;

"(3) an employee engaged in personnel work in other than a purely clerical capacity;

"(4) an employee engaged in administering the provisions of this chapter;

"(5) both professional employees and other employees, unless a majority of the professional employees vote for inclusion in the unit;

"(6) any employee engaged in intelligence, counterintelligence, investigative, or security work which directly affects national security; or

"(7) any employee primarily engaged in investigation or audit functions relating to the work of individuals employed by an agency whose duties directly affect the internal security of the agency, but only if the functions are undertaken to ensure that the duties are discharged honestly and with integrity.

"(c) Any employee who is engaged in administering any provision of law relating to labor-management relations may not be represented by a labor organization—

"(1) which represents other individuals to whom such provision applies; or

"(2) which is affiliated directly or indirectly with an organization which represents other individuals to whom such provision applies.

"(d) Two or more units which are in an agency and for which a labor organization is the exclusive representative may, upon petition by the agency or labor organization, be consolidated with or without an election into a single larger unit if the Authority considers the larger unit to be appropriate. The Authority shall certify the labor organization as the exclusive representative of the new larger unit.

"§ 7113. National consultation rights

"(a) (1) If, in connection with any agency, no labor organization has been accorded exclusive recognition on an agency basis, a labor organization which is the exclusive representative of a substantial number of the employees of the agency, as determined in accordance with criteria prescribed by the Authority, shall be granted national consultation rights by the agency. National consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to any labor organiza-

tion's eligibility for, or continuation of, national consultation rights shall be subject to determination by the Authority.

"(b) (1) Any labor organization having national consultation rights in connection with any agency under subsection (a) of this section shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) be permitted reasonable time to present its views and recommendations regarding the changes.

"(2) If any views or recommendations are presented under paragraph (1) of this subsection to an agency by any labor organization—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

"(c) Nothing in this section shall be construed to limit the right of any agency or exclusive representative to engage in collective bargaining.

"§ 7114. Representation rights and duties

"(a) (1) A labor organization which has been accorded exclusive recognition is the exclusive representative of the employees in the unit it represents and is entitled to act for, and negotiate collective bargaining agreements covering, all employees in the unit. An exclusive representative is responsible for representing the interests of all employees in the

unit it represents without discrimination and without regard to labor organization membership.

"(2) An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—

"(A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or any personnel policy or practices or other general condition of employment; or

"(B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—

"(i) the employee reasonably believes that the examination may result in disciplinary action against the employee; and

"(ii) the employee requests representation.

"(3) Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection.

"(4) Any agency and any exclusive representative in any appropriate unit in the agency, through appropriate representatives, shall meet and negotiate in good faith for the purposes of arriving at a collective bargaining agreement. In addition, the agency and the exclusive representative may determine appropriate techniques, consistent with the provisions of section 7119 of this title, to assist in any negotiation.

"(5) The rights of an exclusive representative under the provisions of this subsection shall not be construed to preclude an employee from—

"(A) being represented by an attorney or other representative, other than the exclusive representative, of the employee's own choosing in any grievance or appeal action; or

"(B) exercising grievance or appellate rights established by law, rule, or regulation;

except in the case of grievance or appeal procedures negotiated under this chapter.

"(b) The duty of an agency and an exclusive representative to negotiate in good faith under subsection (a) of this section shall include the obligation—

"(1) to approach the negotiations with a sincere resolve to reach a collective bargaining agreement;

"(2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on any condition of employment;

"(3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;

"(4) in the case of an agency, to furnish to the exclusive representative involved, or its authorized representative, upon request and, to the extent not prohibited by law, data—

"(A) which is normally maintained by the agency in the regular course of business;

"(B) which is reasonably available and necessary for full and proper discussion, understanding, and negotiation of subjects within the scope of collective bargaining; and

"(C) which does not constitute guidance, advice, counsel, or training provided for management officials or supervisors, relating to collective bargaining; and

"(5) if agreement is reached, to execute on the request of any party to the negotiation a written document embodying the agreed terms, and to take such steps as are necessary to implement such agreement.

"(c) (1) An agreement between any agency and an exclusive representative shall be subject to approval by the head of the agency.

"(2) The head of the agency shall approve the agreement within 30 days from the date the agreement is executed if the agreement is in accordance with the provisions of this chapter and any other applicable law, rule, or regulation (unless the agency has granted an exception to the provision).

"(3) If the head of the agency does not approve or disapprove the agreement within the 30-day period, the agreement shall take effect and shall be binding on the agency and the exclusive representative subject to the provisions of this chapter and any other applicable law, rule, or regulation.

"(4) A local agreement subject to a national or other controlling agreement at a higher level shall be approved under the procedures of the controlling agreement or, if none, under regulations prescribed by the agency.

"§ 7115. Allotments to representatives

"(a) If an agency has received from an employee in an appropriate unit a written assignment which authorizes the agency to deduct from the pay of the employee amounts for the payment of regular and periodic dues of the exclusive representative of the

unit, the agency shall honor the assignment and make an appropriate allotment pursuant to the assignment. Any such allotment shall be made at no cost to the exclusive representative or the employee. Except as provided under subsection (b) of this section, any such assignment may not be revoked for a period of 1 year.

"(b) An allotment under subsection (a) of this section for the deduction of dues with respect to any employee shall terminate when—

"(1) the agreement between the agency and the exclusive representative involved ceases to be applicable to the employee; or

"(2) the employee is suspended or expelled from membership in the exclusive representative.

"(c)(1) Subject to paragraph (2) of this subsection, if a petition has been filed with the Authority by a labor organization alleging that 10 percent of the employees in an appropriate unit in an agency have membership in the labor organization, the Authority shall investigate the petition to determine its validity. Upon certification by the Authority of the validity of the petition, the agency shall have a duty to negotiate with the labor organization solely concerning the deduction of dues of the labor organization from the pay of the members of the labor organization who are employees in the unit and who make a voluntary allotment for such purpose.

"(2)(A) The provisions of paragraph (1) of this subsection shall not apply in the case of any appropriate unit for which there is an exclusive representative.

"(B) Any agreement under paragraph (1) of this subsection between a labor organization and an

agency with respect to an appropriate unit shall be null and void upon the certification of an exclusive representative of the unit.

"§ 7116. Unfair labor practices

"(a) For the purpose of this chapter, it shall be an unfair labor practice for an agency—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to encourage or discourage membership in any labor organization by discrimination in connection with hiring, tenure, promotion, or other conditions of employment;

"(3) to sponsor, control, or otherwise assist any labor organization, other than to furnish, upon request, customary and routine services and facilities if the services and facilities are also furnished on an impartial basis to other labor organizations having equivalent status;

"(4) to discipline or otherwise discriminate against an employee because the employee has filed a complaint, affidavit, or petition, or has given any information or testimony under this chapter;

"(5) to refuse to consult or negotiate in good faith with a labor organization as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) to enforce any rule or regulation (other than a rule or regulation implementing section 2302 of this title) which is in conflict with any applicable collective bargaining agreement if the

agreement was in effect before the date the rule or regulation was prescribed; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

"(b) For the purpose of this chapter, it shall be an unfair labor practice for a labor organization—

"(1) to interfere with, restrain, or coerce any employee in the exercise by the employee of any right under this chapter;

"(2) to cause or attempt to cause an agency to discriminate against any employee in the exercise by the employee of any right under this chapter;

"(3) to coerce, discipline, fine, or attempt to coerce a member of the labor organization as punishment, reprisal, or for the purpose of hindering or impeding the member's work performance or productivity as an employee or the discharge of the member's duties as an employee;

"(4) to discriminate against an employee with regard to the terms or conditions of membership in the labor organization on the basis of race, color, creed, national origin, sex, age, preferential or nonpreferential civil service status, political affiliation, marital status, or handicapping condition;

"(5) to refuse to consult or negotiate in good faith with an agency as required by this chapter;

"(6) to fail or refuse to cooperate in impasse procedures and impasse decisions as required by this chapter;

"(7) (A) to call, or participate in, a strike, work stoppage, or slowdown, or picketing of an

agency in a labor-management dispute if such picketing interferes with an agency's operations, or

"(B) to condone any activity described in subparagraph (A) of this paragraph by failing to take action to prevent or stop such activity; or

"(8) to otherwise fail or refuse to comply with any provision of this chapter.

Nothing in paragraph (7) of this subsection shall result in any informational picketing which does not interfere with an agency's operations being considered as an unfair labor practice.

"(c) For the purpose of this chapter it shall be an unfair labor practice for an exclusive representative to deny membership to any employee in the appropriate unit represented by such exclusive representative except for failure—

"(1) to meet reasonable occupational standards uniformly required for admission, or

"(2) to tender dues uniformly required as a condition of acquiring and retaining membership.

This subsection does not preclude any labor organization from enforcing discipline in accordance with procedures under its constitution or bylaws to the extent consistent with the provisions of this chapter.

"(d) Issues which can properly be raised under an appeals procedure may not be raised as unfair labor practices prohibited under this section. Except for matters wherein, under section 7121 (e) and (f) of this title, an employee has an option of using the negotiated grievance procedure or an appeals procedure, issues which can be raised under a grievance

procedure may, in the discretion of the aggrieved party, be raised under the grievance procedure or as an unfair labor practice under this section, but not under both procedures.

"(e) The expression of any personal view, argument, opinion or the making of any statement which—

"(1) publicizes the fact of a representational election and encourages employees to exercise their right to vote in such election.

"(2) corrects the record with respect to any false or misleading statement made by any person, or

"(3) informs employees of the Government's policy relating to labor-management relations and representation,

shall not, if the expression contains no threat of reprisal or force or promise of benefit or was not made under coercive conditions, (A) constitute an unfair labor practice under any provision of this chapter, or (B) constitute grounds for the setting aside of any election conducted under any provisions of this chapter.

"§ 7117. Duty to bargain in good faith; compelling need; duty to consult

"(a) (1) Subject to paragraph (2) of this subsection, the duty to bargain in good faith shall, to the extent not inconsistent with any Federal law or any Government-wide rule or regulation, extend to matters which are the subject of any rule or regulation only if the rule or regulation is not a Government-wide rule or regulation.

"(2) The duty to bargain in good faith shall, to the extent not inconsistent with Federal law or any Government-wide rule or regulation, extend to mat-

ters which are the subject of any agency rule or regulation referred to in paragraph (3) of this subsection only if the Authority has determined under subsection (b) of this section that no compelling need (as determined under regulations prescribed by the Authority) exists for the rule or regulation.

"(3) Paragraph (2) of the subsection applies to any rule or regulation issued by any agency or issued by any primary national subdivision of such agency, unless an exclusive representative represents an appropriate unit including not less than a majority of the employees in the issuing agency or primary national subdivision, as the case may be, to whom the rule or regulation is applicable.

"(b) (1) In any case of collective bargaining in which an exclusive representative alleges that no compelling need exists for any rule or regulation referred to in subsection (a) (3) of this section which is then in effect and which governs any matter at issue in such collective bargaining, the Authority shall determine under paragraph (2) of this subsection, in accordance with regulations prescribed by the Authority, whether such a compelling need exists.

"(2) For the purpose of this section, a compelling need shall be determined not to exist for any rule or regulation only if—

"(A) the agency, or primary national subdivision, as the case may be, which issued the rule or regulation informs the Authority in writing that a compelling need for the rule or regulation does not exist; or

"(B) the Authority determines that a compelling need for a rule or regulation does not exist.

"(3) A hearing may be held, in the discretion of the Authority, before a determination is made under

this subsection. If a hearing is held, it shall be expedited to the extent practicable and shall not include the General Counsel as a party.

"(4) The agency, or primary national subdivision, as the case may be, which issued the rule or regulation shall be a necessary party at any hearing under this subsection.

"(c)(1) Except in any case to which subsection (b) of this section applies, if an agency involved in collective bargaining with an exclusive representative alleges that the duty to bargain in good faith does not extend to any matter, the exclusive representative may appeal the allegation to the Authority in accordance with the provisions of this subsection.

"(2) The exclusive representative may, on or before the 15th day after the date on which the agency first makes the allegation referred to in paragraph (1) of this subsection, institute an appeal under this subsection by—

"(A) filing a petition with the Authority; and

"(B) furnishing a copy of the petition to the head of the agency.

"(3) On or before the 30th day after the date of the receipt by the head of the agency of the copy of the petition under paragraph (2)(B) of this subsection, the agency shall—

"(A) file with the Authority a statement—

"(i) withdrawing the allegation; or

"(ii) setting forth in full its reasons supporting the allegation; and

"(B) furnish a copy of such statement to the exclusive representative.

"(4) On or before the 15th day after the date of the receipt by the exclusive representative of a copy of a statement under paragraph (3)(B) of this subsection, the exclusive representative shall file with the Authority its response to the statement.

"(5) A hearing may be held, in the discretion of the Authority, before a determination is made under this subsection. If a hearing is held, it shall not include the General Counsel as a party.

"(6) The Authority shall expedite proceedings under this subsection to the extent practicable and shall issue to the exclusive representative and to the agency a written decision on the allegation and specific reasons therefor at the earliest practicable date.

"(d)(1) A labor organization which is the exclusive representative of a substantial number of employees, determined in accordance with criteria prescribed by the Authority, shall be granted consultation rights by any agency with respect to any Government-wide rule or regulation issued by the agency effecting any substantive change in any condition of employment. Such consultation rights shall terminate when the labor organization no longer meets the criteria prescribed by the Authority. Any issue relating to a labor organization's eligibility for, or continuation of, such consultation rights shall be subject to determination by the Authority.

"(2) A labor organization having consultation rights under paragraph (1) of this subsection shall—

"(A) be informed of any substantive change in conditions of employment proposed by the agency, and

"(B) shall be permitted reasonable time to present its views and recommendations regarding the changes.

"(3) If any views or recommendations are presented under paragraph (2) of this subsection to an agency by any labor organization—

"(A) the agency shall consider the views or recommendations before taking final action on any matter with respect to which the views or recommendations are presented; and

"(B) the agency shall provide the labor organization a written statement of the reasons for taking the final action.

"§ 7118. Prevention of unfair labor practices

"(a) (1) If any agency or labor organization is charged by any person with having engaged in or engaging in an unfair labor practice, the General Counsel shall investigate the charge and may issue and cause to be served upon the agency or labor organization a complaint. In any case in which the General Counsel does not issue a complaint because the charge fails to state an unfair labor practice, the General Counsel shall provide the person making the charge a written statement of the reasons for not issuing a complaint.

"(2) Any complaint under paragraph (1) of this subsection shall contain a notice—

"(A) of the charge;

"(B) that a hearing will be held before the Authority (or any member thereof or before an individual employed by the authority and designated for such purpose); and

"(C) of the time and place fixed for the hearing.

"(3) The labor organization or agency involved shall have the right to file an answer to the original and any amended complaint and to appear in person

or otherwise and give testimony at the time and place fixed in the complaint for the hearing.

"(4) (A) Except as provided in subparagraph (B) of this paragraph, no complaint shall be issued based on any alleged unfair labor practice which occurred more than 6 months before the filing of the charge with the Authority.

"(B) If the General Counsel determines that the person filing any charge was prevented from filing the charge during the 6-month period referred to in subparagraph (A) of this paragraph by reason of—

"(i) any failure of the agency or labor organization against which the charge is made to perform a duty owed to the person, or

"(ii) any concealment which prevented discovery of the alleged unfair labor practice during the 6-month period,

the General Counsel may issue a complaint based on the charge if the charge was filed during the 6-month period beginning on the day of the discovery by the person of the alleged unfair labor practice.

"(5) The General Counsel may prescribe regulations providing for informal methods by which the alleged unfair labor practice may be resolved prior to the issuance of a complaint.

"(6) The Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) shall conduct a hearing on the complaint not earlier than 5 days after the date on which the complaint is served. In the discretion of the individual or individuals conducting the hearing, any person involved may be allowed to intervene in the hearing and to present testimony. Any such hearing shall, to the extent practicable, be conducted in accordance with the provisions of subchapter II

of chapter 5 of this title, except that the parties shall not be bound by rules of evidence, whether statutory, common law, or adopted by a court. A transcript shall be kept of the hearing. After such a hearing the Authority, in its discretion, may upon notice receive further evidence or hear argument.

"(7) If the Authority (or any member thereof or any individual employed by the Authority and designated for such purpose) determines after any hearing on a complaint under paragraph (5) of this subsection that the preponderance of the evidence received demonstrates that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, then the individual or individuals conducting the hearing shall state in writing their findings of fact and shall issue and cause to be served on the agency or labor organization an order—

"(A) to cease and desist from any such unfair labor practice in which the agency or labor organization is engaged;

"(B) requiring the parties to renegotiate a collective bargaining agreement in accordance with the order of the Authority and requiring that the agreement, as amended, be given retroactive effect;

"(C) requiring reinstatement of an employee with backpay in accordance with section 5596 of this title; or

"(D) including any combination of the actions described in subparagraphs (A) through (C) of this paragraph, or such other action as will carry out the purpose of this chapter.

If any such order requires reinstatement of an employee with backpay, backpay may be required of

the agency (as provided in section 5596 of this title) or of the labor organization, as the case may be, which is found to have engaged in the unfair labor practice involved.

"(8) If the individual or individuals conducting the hearing determine that the preponderance of the evidence received fails to demonstrate that the agency or labor organization named in the complaint has engaged in or is engaging in an unfair labor practice, the individual or individuals shall state in writing their findings of fact and shall issue an order dismissing the complaint.

"(b) In connection with any matter before the Authority in any proceeding under this section, the Authority may request, in accordance with the provisions of section 7105(i) of this title, from the Director of the Office of Personnel Management an advisory opinion concerning the proper interpretation of rules, regulations, or other policy directives issued by the Office of Personnel Management.

"§ 7119. Negotiation impasses; Federal Service Impasses Panel

"(a) The Federal Mediation and Conciliation Service shall provide services and assistance to agencies and exclusive representatives in the resolution of negotiation impasses. The Service shall determine under what circumstances and in what manner it shall provide services and assistance.

"(b) If voluntary arrangements, including the services of the Federal Mediation and Conciliation Service or any other third-party mediation, fail to resolve a negotiation impasse—

"(1) either party may request the Federal Service Impasses Panel to consider the matter, or

"(2) the parties may agree to adopt a procedure for binding arbitration of the negotiation impasse, but only if the procedure is approved by the Panel.

"(c) (1) The Federal Service Impasses Panel is an entity within the Authority, the function of which is to provide assistance in resolving negotiation impasses between agencies and exclusive representatives.

"(2) The Panel shall be composed of a Chairman and at least six other members, who shall be appointed by the President, solely on the basis of fitness to perform the duties and functions involved, from among individuals who are familiar with Government operations and knowledgeable in labor-management relations.

"(3) Of the original members of the Panel, 2 members shall be appointed for a term of 1 year, 2 members shall be appointed for a term of 3 years, and the Chairman and the remaining members shall be appointed for a term of 5 years. Thereafter each member shall be appointed for a term of 5 years, except that an individual chosen to fill a vacancy shall be appointed for the unexpired term of the member replaced. Any member of the Panel may be removed by the President.

"(4) The Panel may appoint an Executive Director and any other individuals it may from time to time find necessary for the proper performance of its duties. Each member of the Panel who is not an employee (as defined in section 2105 of this title) is entitled to pay at a rate equal to the daily equivalent of the maximum annual rate of basic pay then currently paid under the General Schedule for each day he is engaged in the performance of official business of the Panel, including travel time, and is en-

titled to travel expenses as provided under section 5703 of this title.

"(5) (A) The Panel or its designee shall promptly investigate any impasse presented to it under subsection (b) of this section. The Panel shall consider the impasse and shall either—

"(i) recommend to the parties procedures for the resolution of the impasse; or

"(ii) assist the parties in resolving the impasse through whatever methods and procedures, including factfinding and recommendations, it may consider appropriate to accomplish the purpose of this section.

"(B) If the parties do not arrive at a settlement after assistance by the Panel under subparagraph (A) of this paragraph, the Panel may—

"(i) hold hearings;

"(ii) administer oaths, take the testimony or deposition of any person under oath, and issue subpenas as provided in section 7132 of this title; and

"(iii) take whatever action is necessary and not inconsistent with this chapter to resolve the impasse.

"(C) Notice of any final action of the Panel under this section shall be promptly served upon the parties, and the action shall be binding on such parties during the term of the agreement, unless the parties agree otherwise.

"§ 7120. Standards of conduct for labor organizations

"(a) An agency shall only accord recognition to a labor organization that is free from corrupt influences and influences opposed to basic democratic

principles. Except as provided in subsection (b) of this section, an organization is not required to prove that it is free from such influences if it is subject to governing requirements adopted by the organization or by a national or international labor organization or federation of labor organizations with which it is affiliated, or in which it participates, containing explicit and detailed provisions to which it subscribes calling for—

"(1) the maintenance of democratic procedures and practices including provisions for periodic elections to be conducted subject to recognized safeguards and provisions defining and securing the right of individual members to participate in the affairs of the organization, to receive fair and equal treatment under the governing rules of the organization, and to receive fair process in disciplinary proceedings;

"(2) the exclusion from office in the organization of persons affiliated with communist or other totalitarian movements and persons identified with corrupt influences;

"(3) the prohibition of business or financial interests on the part of organization officers and agents which conflict with their duty to the organization and its members; and

"(4) the maintenance of fiscal integrity in the conduct of the affairs of the organization, including provisions for accounting and financial controls and regular financial reports or summaries to be made available to members.

"(b) Notwithstanding the fact that a labor organization has adopted or subscribed to standards of conduct as provided in subsection (a) of this section, the organization is required to furnish evidence of its freedom from corrupt influences or influences

opposed to basic democratic principles if there is reasonable cause to believe that—

"(1) the organization has been suspended or expelled from, or is subject to other sanction, by a parent labor organization, or federation of organizations with which it had been affiliated, because it has demonstrated an unwillingness or inability to comply with governing requirements comparable in purpose to those required by subsection (a) of this section; or

"(2) the organization is in fact subject to influences that would preclude recognition under this chapter.

"(c) A labor organization which has or seeks recognition as a representative of employees under this chapter shall file financial and other reports with the Assistant Secretary of Labor for Labor Management Relations, provide for bonding of officials and employees of the organization, and comply with trusteeship and election standards.

"(d) The Assistant Secretary shall prescribe such regulations as are necessary to carry out the purposes of this section. Such regulations shall conform generally to the principles applied to labor organizations in the private sector. Complaints of violations of this section shall be filed with the Assistant Secretary. In any matter arising under this section, the Assistant Secretary may require a labor organization to cease and desist from violations of this section and require it to take such actions as he considers appropriate to carry out the policies of this section.

"(e) This chapter does not authorize participation in the management of a labor organization or acting as a representative of a labor organization by a management official, a supervisor, or a confidential employee, except as specifically provided in this chap-

ter, or by an employee if the participation or activity would result in a conflict or apparent conflict of interest or would otherwise be incompatible with law or with the official duties of the employee.

"(f) In the case of any labor organization which by omission or commission has willfully and intentionally, with regard to any strike, work stoppage, or slowdown, violated section 7116(b)(7) of this title, the Authority shall, upon an appropriate finding by the Authority of such violation—

"(1) revoke the exclusive recognition status of the labor organization, which shall then immediately cease to be legally entitled and obligated to represent employees in the unit; or

"(2) take any other appropriate disciplinary action.

"SUBCHAPTER III—GRIEVANCES, APPEALS, AND REVIEW

"§ 7121. Grievance procedures

"(a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.

"(2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.

"(b) Any negotiated grievance procedure referred to in subsection (a) of this section shall—

"(1) be fair and simple,

"(2) provide for expeditious processing, and

"(3) include procedures that—

"(A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances;

"(B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; and

"(C) provide that any grievance not satisfactorily settled under the negotiated grievance procedure shall be subject to binding arbitration which may be invoked by either the exclusive representative or the agency.

"(c) The preceding subsections of this section shall not apply with respect to any grievance concerning—

"(1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);

"(2) retirement, life insurance or health insurance;

"(3) a suspension or removal under section 7532 of this title;

"(4) any examination, certification, or appointment; or

"(5) the classification of any position which does not result in the reduction in grade or pay of an employee.

"(d) An aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure or the negotiated procedure, but not both. An employee shall be deemed to have exercised his option under this subsection to raise the matter under either a statutory procedure or the negotiated procedure at such time as the employee timely initiates an action under the applicable statutory procedure or timely files a grievance in writing, in accordance with the provisions of the parties' negotiated procedure, whichever event occurs first. Selection of the negotiated procedure in no manner prejudices the right of an aggrieved employee to request the Merit System Protection Board to review the final decision pursuant to section 7702 of this title in the case of any personnel action that could have been appealed to the Board, or, where applicable, to request the Equal Employment Opportunity Commission to review a final decision in any other matter involving a complaint of discrimination of the type prohibited by any law administered by the Equal Employment Opportunity Commission.

"(e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both. An employee shall be

deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first.

"(2) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, an arbitrator shall be governed by section 7701(c)(1) of this title, as applicable.

"(f) In matters covered under sections 4303 and 7512 of this title which have been raised under the negotiated grievance procedure in accordance with this section, section 7703 of this title pertaining to judicial review shall apply to the award of an arbitrator in the same manner and under the same conditions as if the matter had been decided by the Board. In matters similar to those covered under sections 4303 and 7512 of this title which arise under other personnel systems and which an aggrieved employee has raised under the negotiated grievance procedure, judicial review of an arbitrator's award may be obtained in the same manner and on the same basis as could be obtained of a final decision in such matters raised under applicable appellate procedures.

"§ 7122. Exceptions to arbitral awards

"(a) Either party to arbitration under this chapter may file with the Authority an exception to any arbitrator's award pursuant to the arbitration (other than an award relating to a matter described in section 7121(f) of this title). If upon review the Authority finds that the award is deficient —

"(1) because it is contrary to any law, rule, or regulation; or

"(2) on other grounds similar to those applied by Federal courts in private sector labor-management relations;

the Authority may take such action and make such recommendations concerning the award as it considers necessary, consistent with applicable laws, rules, or regulations.

"(b) If no exception to an arbitrator's award is filed under subsection (a) of this section during the 30-day period beginning on the date of such award, the award shall be final and binding. An agency shall take the actions required by an arbitrator's final award. The award may include the payment of backpay (as provided in section 5596 of this title).

"§ 7123. Judicial review; enforcement

"(a) Any person aggrieved by any final order of the Authority other than an order under—

"(1) section 7122 of this title (involving an award by an arbitrator), unless the order involves an unfair labor practice under section 7118 of this title, or

"(2) section 7112 of this title (involving an appropriate unit determination),

may, during the 60-day period beginning on the date on which the order was issued, institute an action for judicial review of the Authority's order in the United States court of appeals in the circuit in which the person resides or transacts business or in the United States Court of Appeals for the District of Columbia.

"(b) The Authority may petition any appropriate United States court of appeals for the enforcement

of any order of the Authority and for appropriate temporary relief or restraining order.

"(c) Upon the filing of a petition under subsection (a) of this section for judicial review or under subsection (b) of this section for enforcement, the Authority shall file in the court the record in the proceedings, as provided in section 2112 of title 28. Upon the filing of the petition, the court shall cause notice thereof to be served to the parties involved, and thereupon shall have jurisdiction of the proceeding and of the question determined therein and may grant any temporary relief (including a temporary restraining order) it considers just and proper, and may make and enter a decree affirming and enforcing, modifying and enforcing as so modified, or setting aside in whole or in part the order of the Authority. The filing of a petition under subsection (a) or (b) of this section shall not operate as a stay of the Authority's order unless the court specifically orders the stay. Review of the Authority's order shall be on the record in accordance with section 706 of this title. No objection that has not been urged before the Authority, or its designee, shall be considered by the court, unless the failure or neglect to urge the objection is excused because of extraordinary circumstances. The findings of the Authority with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any person applies to the court for leave to adduce additional evidence and shows to the satisfaction of the court that the additional evidence is material and that there were reasonable grounds for the failure to adduce the evidence in the hearing before the Authority, or its designee, the court may order the additional evidence to be taken before the Authority, or its designee, and to be made a part of the record. The Authority may modify its find-

ings as to the facts, or make new findings by reason of additional evidence so taken and filed. The Authority shall file its modified or new findings, which, with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. The Authority shall file its recommendations, if any, for the modification or setting aside of its original order. Upon the filing of the record with the court, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the judgment and decree shall be subject to review by the Supreme Court of the United States upon writ of certiorari or certification as provided in section 1254 of title 28.

"(d) The Authority may, upon issuance of a complaint as provided in section 7118 of this title charging that any person has engaged in or is engaging in an unfair labor practice, petition any United States district court within any district in which the unfair labor practice in question is alleged to have occurred or in which such person resides or transacts business for appropriate temporary relief (including a restraining order). Upon the filing of the petition, the court shall cause notice thereof to be served upon the person, and thereupon shall have jurisdiction to grant any temporary relief (including a temporary restraining order) it considers just and proper. A court shall not grant any temporary relief under this section if it would interfere with the ability of the agency to carry out its essential functions or if the Authority fails to establish probable cause that an unfair labor practice is being committed.

"SUBCHAPTER IV—ADMINISTRATIVE AND OTHER PROVISIONS

"§ 7131. Official time

"(a) Any employee representing an exclusive representative in the negotiation of a collective bargaining agreement under this chapter shall be authorized official time for such purposes, including attendance at impasse proceeding, during the time the employee otherwise would be in a duty status. The number of employees for whom official time is authorized under this subsection shall not exceed the number of individuals designated as representing the agency for such purposes.

"(b) Any activities performed by any employee relating to the internal business of a labor organization (including the solicitation of membership, elections of labor organization officials, and collection of dues) shall be performed during the time the employee is in a non-duty status.

"(c) Except as provided in subsection (a) of this section, the Authority shall determine whether any employee participating for, or on behalf of, a labor organization in any phase of proceedings before the Authority shall be authorized official time for such purpose during the time the employee otherwise would be in a duty status.

"(d) Except as provided in the preceding subsections of this section—

"(1) any employee representing an exclusive representative, or

"(2) in connection with any other matter covered by this chapter, any employee in an appropriate unit represented by an exclusive representative,

shall be granted official time in any amount the agency and the exclusive representative involved agree to be reasonable, necessary, and in the public interest.

"§ 7132. Subpenas

"(a) Any member of the Authority, the General Counsel, or the Panel, any administrative law judge appointed by the Authority under section 3105 of this title, and any employee of the Authority designated by the Authority may—

"(1) issue subpenas requiring the attendance and testimony of witnesses and the production of documentary or other evidence from any place in the United States; and

"(2) administer oaths, take or order the taking of depositions, order responses to written interrogatories, examine witnesses, and receive evidence.

No subpena shall be issued under this section which requires the disclosure of intramanagement guidance, advice, counsel, or training within an agency or between an agency and the Office of Personnel Management.

"(b) In the case of contumacy or failure to obey a subpena issued under subsection (a)(1) of this section, the United States district court for the judicial district in which the person to whom the subpena is addressed resides or is served may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the order of the court may be punished by the court as a contempt thereof.

"(c) Witnesses (whether appearing voluntarily or under subpena) shall be paid the same fee and mile-

age allowances which are paid subpenaed witnesses in the courts of the United States.

"§ 7133. Compilation and publication of data

"(a) The Authority shall maintain a file of its proceedings and copies of all available agreements and arbitration decisions, and shall publish the texts of its decisions and the actions taken by the Panel under section 7119 of this title.

"(b) All files maintained under subsection (a) of this section shall be open to inspection and reproduction in accordance with the provisions of sections 552 and 552a of this title.

"§ 7134. Regulations

"The Authority, the General Counsel, the Federal Mediation and Conciliation Service, the Assistant Secretary of Labor for Labor Management Relations, and the Panel shall each prescribe rules and regulations to carry out the provisions of this chapter applicable to each of them, respectively. Provisions of subchapter II of chapter 5 of this title shall be applicable to the issuance, revision, or repeal of any such rule or regulation.

"§ 7135. Continuation of existing laws, recognitions, agreements, and procedures

"(a) Nothing contained in this chapter shall preclude—

"(1) the renewal or continuation of an exclusive recognition, certification of an exclusive representative, or a lawful agreement between an agency and an exclusive representative of its employees, which is entered into before the effective date of this chapter; or

"(2) the renewal, continuation, or initial according of recognition for units of management

officials or supervisors represented by labor organizations which historically or traditionally represent management officials or supervisors in private industry and which hold exclusive recognition for units of such officials or supervisors in any agency on the effective date of this chapter.

"(b) Policies, regulations, and procedures established under and decisions issued under Executive Orders 11491, 11616, 11636, 11787, and 11838, or under any other Executive order, as in effect on the effective date of this chapter, shall remain in full force and effect until revised or revoked by the President, or unless superseded by specific provisions of this chapter or by regulations or decisions issued pursuant to this chapter."

APPENDIX F

NATIONAL GUARD TECHNICIANS ACT

32 U.S.C. § 709. Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in—

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.

(d) A technician employed under subsection (a) is an employee of the Department of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military

grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

(f) Sections 2108, 3502, 7511, and 7512 of title 5, do not apply to any person employed under this section.

(g) (1) Notwithstanding sections 5544(a) and 6101 (a) of title 5, or any other provision of law, the Secre-

tary concerned may, in the case of technicians assigned to perform operational duties at air defense sites—

(A) prescribe the hours of duties;

(B) fix the rates of basic compensation; and

(C) fix the rates of additional compensation;

to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays. Additional compensation under this subsection may be fixed on an annual basis and is determined as an appropriate percentage, not in excess of 12 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-16 of the General Schedule under section 5332 of title 5.

(2) Notwithstanding sections 5544(a) and 6101(a) of title 5, or any other provision of law, the Secretary concerned may, for technicians other than those described in clause (1) of this subsection, prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5, or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(h) In no event shall the number of technicians employed under this section at any one time exceed 53,100.

APPENDIX G

5 FLRA No. 25

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL LABOR RELATIONS AUTHORITY
WASHINGTON, D.C.

Case No. 0-NG-149

NATIONAL ASSOCIATION OF GOVERNMENT EMPLOYEES, LOCAL R12-132
Union

and

CALIFORNIA NATIONAL GUARD
Activity

DECISION AND ORDER OF NEGOTIABILITY ISSUE

This case comes before the Federal Labor Relations Authority (the Authority) pursuant to section 7105(a)(2)(E) of the Federal Service Labor-Management Relations Statute (the Statute) (5 U.S.C. § 7101 *et seq.*).

During the course of contract negotiations between the parties to renew their expiring agreement, the Union submitted the following proposal which the Agency declared nonnegotiable: [1]

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[1] In its negotiability appeal filed with the Authority pursuant to section 7117(c) of the Statute, the Union submitted two other proposals which it claimed were in dispute. However, the Agency, in its statement of position filed in response to the Union's appeal, declared these two other proposals negotiable. In a subsequent letter to the Authority, the Union indicated that the two proposals were no longer in dispute and that it was withdrawing its request for negotiability determinations thereon. Under the foregoing circumstances, the Union's request to withdraw the two proposals from consideration by the Authority is hereby granted.

Union Proposal

ARTICLE XXIII

NEGOTIATED GRIEVANCE PROCEDURE

(DELETE) Sections 1, 2, 3, 4a., 4b., and 4c.

(INSERT) NEW Sections 1, 2, 3 and 4:

Section 1. This article establishes the exclusive procedure available to the employees in the unit, the Union and the Employer for resolving all grievances which fall within its scope. Grievances to be processed under this article shall apply to matters of concern or dissatisfaction regarding the interpretation, application or violation of law, regulations, or this agreement; conditions of employment; or relationships with agency supervisors and officials, including prohibited personnel practice charges and disciplinary and adverse actions. It does not apply to:

a. A violation relating to political activities;

b. Retirement, life insurance, or health insurance;

c. A suspension or removal for national security;

d. Any examination, certification or appointment;

e. Classification of position which does not result in the reduction in grade or pay of the employee; or

f. EEO Complaints

Section 2. Where a matter may be raised under an applicable appellate procedure and this negotiated grievance procedure the employee at his discretion may raise the matter under the appellate procedure or this negotiated grievance procedure, but not both.

Question Here Before the Authority

The question is whether the Union's proposed grievance procedure, which includes within its coverage appeals of adverse actions of National Guard technicians, is outside the duty to bargain under section 7117 of the Statute because it is inconsistent with Federal law (32 U.S.C. § 709(e)),[3] as alleged by the Agency.

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[3] Section 709 of the National Guard Technicians Act of 1968, 32 U.S.C. § 709(e) (1970) provides as follows:

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

Opinion

Conclusion and Order: The grievance procedure here in dispute, which includes within its coverage matters relating to appeals of adverse actions of National Guard technicians, is within the Agency's duty to bargain under the Statute, and is not inconsistent with 32 U.S.C. § 709(e). Accordingly, pursuant to section 2424.10 of the Authority's rules and regulations (5 CFR 2424.10, *as amended by* 45 Fed Reg. 48,575 (1980)), IT IS ORDERED that the Agency shall upon request (or as otherwise agreed to by the parties) bargain concerning the subject proposal.[8]

Reasons: The National Guard technicians covered by the instant proposal are employed pursuant to the National Guard Technicians Act of 1968, 32 U.S.C. § 709. This Act, which creates a separate personnel system applicable only to such technicians, provides that such technicians are employed in civilian positions to administer and train the National Guard and to maintain and repair the supplies issued to the National Guard or the armed forces. 32 U.S.C. § 709(a). The Act also requires, generally, that as a condition of their civilian employment, technicians must become and remain military members of the National Guard. 32 U.S.C. § 709(b). In this latter regard, the Act provides that a technician who is separated from the Guard, as a military member, or who fails to maintain the military grade specified for his position, "shall be promptly separated from his technician employment." 32 U.S.C. § 709(e)(1). In addition, if a technician "fails to meet . . . military security standards . . . [such technician] may be separated from his employment as a technician and concurrently discharged from the National Guard. . . ." 32 U.S.C. § 709(e)(2). Further, and as here relevant, if a technician remains a member of the

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[8] In so deciding that the disputed proposal is within the duty to bargain, the Authority makes no judgment as to the merits of such proposal.

National Guard and is otherwise eligible for continued technician employment under 32 U.S.C. § 709(e)(1) and (e)(2), the Act grants additional authority in 32 U.S.C. § 709(e)(3) and (e)(4) to adjutants general in their respective jurisdictions to take adverse personnel actions (e.g., suspensions, reductions to pay or grade and removals) against technicians *qua* technicians, and finally, 32 U.S.C. § 709(e)(5) and (e)(6) provides an appellate procedure for technicians to appeal adverse personnel actions taken against them.

As to the inclusion of matters related to appeals of adverse personnel actions taken against technicians in the proposed grievance procedure, the Agency takes the position that there is nothing contained in either the express provisions of the Civil Service Reform Act of 1978 or its legislative history which indicates a Congressional intent to repeal, modify or supersede any substantive provisions of the Technicians Act. Therefore, the Agency argues, under well-recognized principles of statutory construction, section 709(e) of the Technicians Act, which designates the adjutant general of the jurisdiction concerned as the final arbiter of appeals of adverse actions of National Guard technicians, remains the exclusive means of resolving such disputes.

The Agency also contends that, if section 7121(e)(1) of the Statute is properly construed, it is clear that National Guard technicians were not to be included within the definition of employees covered by that section. In this regard, the Agency argues, section 7121(e)(1) introduces adverse action matters (i.e., reductions in pay or grade, suspensions, removals, etc.) into the negotiated grievance procedures by reference to chapters 43 and 75 of title 5 of the United States Code which create the adverse action system; and, since National Guard technicians are specifically excluded by regulations of the Office of Personnel Management from coverage under chapters

48 and 75 of title 5,[4] section 7121(e)(1) of the Statute therefore must also be construed to exclude National Guard technicians from its coverage.

Finally, the Agency contends that inclusion of appeals of adverse actions involving National Guard technicians within the scope of grievance procedures negotiated under the Statute, which procedures end in binding arbitration, would violate the provision in 32 U.S.C. § 709(e)(5) that such appeals "shall not extend beyond the adjutant general of the jurisdiction concerned."

The Agency's contentions cannot be sustained. The definitions of "agency" and "employee" for purposes of the Statute include National Guard technicians under 5 U.S.C. § 7103(a)(3) and (2) respectively. In addition, section 7121 of the Statute provides for broad scope grievance procedures.[5] As stated with respect to section 7121 in the

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[4] *See*, 5 CFR 432.201(c)(3)(xiii) and 5 CFR 752.401(c)(13).

[5] Section 7121 of the Statute provides, in pertinent part, as follows:

> § 7121. *Grievance procedures*
>
> (a)(1) Except as provided in paragraph (2) of this subsection, any collective bargaining agreement shall provide procedures for the settlement of grievances, including questions of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage.
>
> (2) Any collective bargaining agreement may exclude any matter from the application of the grievance procedures which are provided for in the agreement.
>
> . . . . .
>
> (e) The preceding subsections of this section shall not apply with respect to any grievance concerning—
>
> (1) any claimed violation of subchapter III of chapter 73 of this title (relating to prohibited political activities);
>
> (2) retirement, life insurance, or health insurance;

[Footnote continued on page 99a]

Conference Report accompanying the final version of the bill which was subsequently enacted and signed into law:

> All matters that under the provisions of law could be submitted to the grievance procedures shall in fact be within the scope of any grievance procedure negotiated by the parties unless the parties agree as part of the collective bargaining process that certain matters shall not be covered by the grievance procedures. *Joint Explanatory Statement of the Committee on Conference*, H.R. Rep. No. 1717, 95th Cong., 2d Sess. 157, *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2860, 2891.

The list of matters excluded from permissible coverage within negotiated grievance procedures by section 7121 (c) of the Statute does not advert to adverse actions involving National Guard technicians. Thus, on their face, grievance procedures negotiated under the Statute cover such matters unless the parties exclude them through bargaining.[8] Moreover, section 7121(e)(1) of the Statute provides:

> (e)(1) Matters covered under sections 4303 and 7512 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either

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[8] [Continued]

> (3) a suspension or removal under section 7532 of this title;
>
> (4) any examination, certification, or appointment; or
>
> (5) the classification of any position which does not result in the reduction in grade or pay of an employee.

[9] *See*, in this regard, *American Federation of Government Employees, AFL-CIO, Local 3669 and Veterans Administration Medical Center, Minneapolis, Minnesota*, 3 FLRA No. 48 (1980), and *American Federation of Government Employees, AFL-CIO, Local 3354 and U.S. Department of Agriculture, Farmers Home Administration, St. Louis, Missouri*, 3 FLRA No. 50 (1980).

> under the appellate procedures of section 7701 of this title or under the negotiated grievance procedure, but not both. *Similar matters which arise under other personnel systems applicable to employees covered by this chapter may, in the discretion of the aggrieved employee, be raised either under the appellate procedures, if any, applicable to those matters, or under the negotiated grievance procedure, but not both.* An employee shall be deemed to have exercised his option under this subsection to raise a matter either under the applicable appellate procedures or under the negotiated grievance procedure at such time as the employee timely files a notice of appeal under the applicable appellate procedures or timely files a grievance in writing in accordance with the provisions of the parties' negotiated grievance procedure, whichever event occurs first. 5 U.S.C. § 7121(e)(1). [Emphasis added.]

This language as reported out of the Senate-House Conference Committee in the final version of the bill enacted and signed into law was identical to that in the bill (S. 2640) reported out of the Senate Committee on Government Affairs and subsequently passed by the Senate. The Senate Committee reported on this subsection as follows:

> Subsection (e) provides employees with an option, in appealing matters covered under 5 U.S.C. section 4303 (demotion or removal for unacceptable performance) or 5 U.S.C. section 7512 (removal, suspension for more than 30 days, reduction in grade, reduction in pay of an amount exceeding one step of an employee's grade or 8 percent of the employee's basic pay, furlough for 30 days or less), of using the statutory appeal procedure under 5 U.S.C. section 7701 or the negotiated grievance procedure if such matters have been negotiated into coverage under the grievance procedure. It also provides that matters similar to those listed above which may arise under

> other personnel systems applicable to employees covered by this subchapter, such as those provided in title 38, United States Code, may, in the discretion of the aggrieved employee, be raised under either the negotiated grievance procedure or under any appellate procedures which would otherwise be available to the employee if the matter weren't covered by the grievance procedure. S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978) *reprinted in* [1978] *U.S. Code Cong. & Ad. News* 2723, 2832.

This clearly states Congress' intent that adverse actions arising "under other personnel systems applicable to employees covered by [the Statute]" (as is the case with title 32 employees), which are similar to the disciplinary and adverse actions described in 5 U.S.C. § 4303 and 5 U.S.C. § 7512 can be covered by the provisions of section 7121 of the Statute. It also clearly states Congress' intent that such employees subject to other personnel systems (as is the case with title 32 employees) have the same option as employees covered by title 5 to utilize a negotiated grievance procedure (if the procedure covers the matter) or an available appellate procedure when they wish to challenge such actions.[7] Accordingly, the Agency's contention that appeals of adverse actions of National Guard Technicians are excluded from coverage of section 7121(e)(1) of the Statute by virtue of their exclusion from coverage of chapters 43 and 75 of title 5 (note 4, *supra*), is based on misinterpretation of section 7121(e)(1) of the Statute and cannot be sustained. Similarly, for the reasons set forth above, the Agency's assertion that under well-settled principles of statutory construction the adjutant general of the jurisdiction involved re-

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[7] *See*, in this regard, *American Federation of Government Employees, Local 3669, AFL-CIO and Veterans Administration Medical Center, Minneapolis, Minnesota*, 4 FLRA No. 53 (1980), wherein the Authority found negotiable proposals relating to disciplinary and adverse actions of title 38 employees.

mains the exclusive means of resolving such disputes under section 709(e) of the Technicians Act cannot be sustained.

Finally, the Agency's contention that including appeals of adverse actions involving National Guard technicians within the coverage of negotiated grievance procedures culminating in final and binding arbitration will violate the provision in 32 U.S.C. § 709(e)(5) (*see* note 2, *supra*) that such appeals shall not extend beyond the adjutant general level cannot be sustained. While the National Guard Technicians Act of 1968 establishes a statutory appeal procedure covering adverse actions involving National Guard technicians, which procedure culminates at the adjutant general level, nothing contained in that Act precludes the Agency from fulfilling its obligation *under the Statute* to negotiate a separate contractual grievance procedure culminating in binding arbitration under which adverse actions involving bargaining unit employees could be processed at the option of the employee. As previously stated, the existence of such *alternative* procedures was expressly contemplated by Congress in enacting section 7121(e) of the Statute. In so concluding, however, the Authority emphasizes that the statutory appeal procedure contained in the National Guard Technicians Act of 1968 remains the exclusive procedure covering adverse actions involving National Guard technicians where such matters have been specifically excluded by the parties from the scope of their negotiated grievance procedure or where National Guard technicians are not within units of exclusive recognition.

In summary, we hold that the disputed grievance procedure is within the Agency's duty to bargain under the Statute. Accordingly, the allegation that the proposed grievance procedure is not within the duty to bargain is set aside.

Issued, Washington, D.C., February 20, 1981

/s/ Ronald W. Haughton
RONALD W. HAUGHTON, Chairman

/s/ Henry B. Frazier III, Member
HENRY B. FRAZIER III, Member

/s/ Leon B. Applewhaite
LEON B. APPLEWHAITE, Member

Federal Labor Relations Authority

APPENDIX H

38 U.S.C. § 4110. Disciplinary boards

(a) The Chief Medical Director, under regulations prescribed by the Administrator shall from time to time appoint boards to be known as disciplinary boards, each such board to consist of not less than three nor more than five employees, senior in grade, of the Department of Medicine and Surgery, to determine, upon notice and fair hearing, charges of inaptitude, inefficiency, or misconduct of any person employed in a position provided in paragraph (1) of section 4104 of this title. When such charges concern a dentist, the majority of employees on the disciplinary board shall be dentists.

(b) The Administrator shall appoint the chairman and secretary of the board, each of whom shall have authority to administer oaths.

(c) The Chief Medical Director may designate or appoint one or more investigators, to assist each disciplinary board in the collection and presentation of evidence. Any person answering to charges before a disciplinary board may be represented by counsel of his own choosing.

(d) A disciplinary board, when in its judgment charges are sustained, shall recommend to the Administrator suitable disciplinary action, within limitations prescribed by the Administrator, which shall include reprimand, suspension without pay, reduction in grade, and discharge from the Department of Medicine and Surgery of such person. The Administrator shall either approve the recommendation of the board, approve such recommendation with modification or exception, approve such recommendation and suspend further action at this time, or disapprove such recommendation. He shall cause to be executed such action as he approves.

(e) The Administrator, within such limitations as he may prescribe, may delegate to the Chief Medical Di-

rector the authority vested in him by subsections (b) and (d) of this section to (1) appoint the chairman and secretary of a disciplinary board, such official to have the power prescr.bed by this section, and (2) receive and act upon the recommendations of such a board. Any person against whom disciplinary action is taken under authority delegated pursuant to this subsection shall have the right to appeal such action to the Administrator, but in the absence of such an appeal the decision of the Chief Medical Director shall have the same force and effect as a decision of the Administrator.

Pub.L. 85-857, Sept. 2, 1958, 72 Stat. 1246; Pub.L. 88-207, Dec. 17, 1963, 77 Stat. 402.

Office - Supreme Court, U.S.
FILED
OCT 18 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-224

In the Supreme Court of the United States

OCTOBER TERM, 1982

AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, AFL-CIO, LOCAL 3486, PETITIONER

v.

NEW JERSEY AIR NATIONAL GUARD, 177TH FIGHTER INTERCEPTOR GROUP AND UNITED STATES DEPARTMENT OF DEFENSE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

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The court of appeals held that proposals made by a union of technicians employed by the New Jersey Air National Guard, which would require the submission of personnel grievances to binding arbitration, are outside the National Guard's duty to bargain, because binding arbitration is prohibited by 32 U.S.C. 709(e) of the National Guard Technicians Act of 1968 ("Technician Act"). That provision states that "[n]otwithstanding any other provision of law," appeals by National Guard technicians of adverse personnel actions "shall not extend beyond the adjutant general" of the state. 32 U.S.C. 709(e)(5). Petitioner contends that this holding conflicts with provisions of the labor-management relations chapter of the Civil Service Reform Act of 1978, 5 U.S.C. (Supp. V) 7101 *et seq.* ("Labor-Management

Act"), that grant federal employee unions the right to negotiate for a grievance procedure culminating in binding arbitration (5 U.S.C. (Supp. V) 7121(a) and (b)) and provide that where such a procedure has been agreed upon, covered employees may elect to pursue grievances either through the negotiated procedure or through any appellate remedy provided by any "other personnel system[] applicable to [the] employees" (5 U.S.C. (Supp. V) 7121(e)(1)).[1]

Petitioner's contentions are incorrect for the reasons stated in the thorough opinion of the court of appeals, upon which we rely. Because there is no conflict among the circuits on this issue, this case does not warrant review in this Court.

1. In the course of collective bargaining between the New Jersey Air National Guard ("the Guard") and petitioner, a dispute arose concerning the negotiability of union proposals pertaining to adverse personnel actions and the processing of employee grievances.[2] The union proposals would

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[1]32 U.S.C. 709(e) is reproduced at Pet. App. 88a-89a. Pertinent provisions of the Labor-Management Act are reproduced at Pet. App. 77a-78a and Pet. App. 79a-80a.

[2]The union proposals at issue here state (Pet. App. 12a n.1):

Grievance Procedure

Section 4. An aggrieved employee affected by discrimination, removal, reduction in grade or pay based on an unacceptable performance or any other adverse action may raise the matter under any statutory appellant [sic] procedure or *with the concurrence of the union* under the negotiated procedure but not both; *except for a discrimination complaint which may be a mixed procedure and filed under both processes.*

Adverse Disciplinary Action

Section 4(b). The parties agree that the grievance procedure negotiated herein (Article XI) may be used to adjudicate any

have subjected grievances pertaining to layoffs and adverse personnel actions to procedures culminating in binding arbitration. When the Guard asserted that these proposals concerned matters that are non-negotiable, petitioner brought the matter before the Federal Labor Relations Authority ("FLRA")—the federal agency charged with implementing the Labor-Management Act and overseeing disputes between the federal government and its employees. With exceptions noted in the margin (see page 2, note 2, *supra*), the FLRA held the proposals to be within the Guard's duty to bargain and ordered the Guard to engage in collective bargaining over the disputed matters (Pet. App. 1a-8a).

Pursuant to 5 U.S.C. (Supp. V) 7123(a), the New Jersey Air National Guard and the United States Department of Defense filed a petition for review of the FLRA decision and order in the court of appeals. The FLRA filed a cross-petition for enforcement of its order and petitioner intervened in the action (Pet. App. 13a). The court of appeals granted the petition for review, set aside the decision of the FLRA, and denied its petition for cross-enforcement (*id.* at 9a-30a).

2. Petitioner's central contention (Pet. 11) is that the court of appeals' decision "through its interpretation of the National Guard Technician Act (32 U.S.C. 709(e)) eviscerates the later enacted 5 U.S.C. § 7121(e)" of the Labor-Management Act. But the court of appeals correctly concluded (Pet. App. 16a), that the plain language of the Technician Act, 32 U.S.C. 709(e), precludes bargaining

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misunderstanding or disagreement relating to "just cause" and what is considered "fair and equitable."

The Federal Labor Relations Authority held the italicized portions of the grievance procedure proposal to be non-negotiable. Petitioner did not seek review of that portion of the FLRA decision, and the correctness of this aspect of the FLRA decision is not at issue in this Court.

respecting the union's proposal. Accordingly, as the court below recognized (Pet. App. 27a), the question presented is whether Congress intended the provisions of the Labor-Management Act relied upon by petitioner to repeal by implication the clear prohibition in the Technician Act. The negative answer given that question by the court of appeals is powerfully supported by the many considerations adduced in the court's opinion.

First, contrary to the view of the FLRA (see Pet. App. 100a),[3] Section 709(e) absolutely precludes binding arbitration on personnel matters affecting national guard technicians and cannot be accommodated to application of the Labor-Management Act (see Pet. App. 21a-22a). Second, Section 709(e) expressly provides that its provisions are to operate "notwithstanding any other provision of law"; the pertinent provisions of the Labor-Management Act contain no similar statement.[4] Thus, the plain language of the two statutes dictates that the Technician Act is controlling (Pet. App. 22a-23a). Third, as the court of appeals noted (*id.* at 24a-26a), the legislative history of the Technician Act, a narrowly framed measure specifically designed to regulate comprehensively the status of National Guard technicians, shows that Congress regarded as of paramount importance

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[3]The FLRA's decision in this case (Pet. App. 1a-8a) relies (*id.* at 4a) upon the Authority's companion decision in *National Association of Government Employees, Local R12-132 and California National Guard*, 5 F.L.R.A. No. 25 (Feb. 20, 1981) (Pet. App. 91a-101a). A petition for review of the companion decision is pending in the Ninth Circuit together with a cross-petition for enforcement (*California National Guard* v. *FLRA*, Nos. 81-7231 & 81-7336).

[4]As the court of appeals noted (Pet. App. 13a), the National Guard is "something of a hybrid:" a unique entity that is an instrumentality of both state and federal government. It therefore is not surprising that a general statutory provision applicable to most civilian federal employees does not override the special provisions of federal law that govern the status of National Guard technicians and preserve the authority of state adjutants general.

the provisions of Section 709(e) barring interference through grievance procedures with the military authority of state adjutants general. By contrast, neither the language nor the legislative history of the Labor-Management Act, a statute broadly applicable to most federal civilian employees, reflects any awareness of the special situation of National Guard technicians, much less an intention to alter the carefully crafted rule established in 1968 by enactment of Section 709(e).

These factors, the court of appeals concluded (Pet. App. 28a-29a), make unusually appropriate application of this Court's teaching that "a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum" (*Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976)). As the court explained (Pet. App. 29a-30a):

> It appears inconceivable that Congress in 1978, without a moment's thought as to the question of state control over the National Guard, or as to the needs of military discipline over Guard technicians in their dual status as civilian and military personnel, intended to eliminate, by mere implication, the controls that Congress carefully had imposed over those employees and deemed "essential" ten years earlier.
>
> Because such a conclusion appears unwarranted by anything contained in the statutes themselves or the legislative histories accompanying them, we must reject the position of the FLRA and hold that the provisions of section 709(e) of the Technician Act remain as exceptions to the terms of the Labor-Management Act. Only this reading of the two statutes successfully gives to both statutes the effect evidently intended by Congress * * *. Because we cannot apply those general provisions to Guard technicians without

> in effect repealing section 709(e) of the Technician Act, and because it is abundantly clear that Congress deemed section 709(e) to be of considerable importance to the proper functioning of the National Guard as a military unit under dual state-federal control, we hold that the requirements of section 7121 of the Labor-Management Act do not override the provisions of section 709(e) of the Technician Act. To do otherwise would permit a subtle subversion of a clear congressional intent.

Contrary to petitioner's suggestion, this reasoning does not render nugatory the provisions of the Labor-Management Act upon which petitioner relies. It merely limits their application to National Guard technicians—a tiny fraction of the federal workforce.[5]

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[5]Nothing in the legislative history of the Labor-Management Act suggests that 5 U.S.C. (Supp. V) 7121(e) was intended to override barriers, expressly created by narrowly focused statutes such as the Technician Act, to review of agency personnel decisions by arbitration or other negotiated grievance procedures. The language excerpted by petitioner (Pet. 8) from S. Rep. No. 95-969, 95th Cong., 2d Sess. 110 (1978), indicates only that Section 7121(e) provides an alternative to existing agency grievance procedures. It plainly does not indicate that statutes precluding review of personnel decisions are abrogated. Nor is there any merit to petitioner's suggestion that a casual reference in the quoted portion of the Senate Committee Report to "personnel systems * * * such as those provided in Title 38" supplies the necessary evidence of intent to repeal prior limits upon administrative review. First, there is no evidence whatever that Congress had in mind the disciplinary procedures for Veterans Administration medical personnel established by 38 U.S.C. 4110—the example singled out by petitioner. *A fortiori* the committee report reflects no intention to override the finality provision of 38 U.S.C. 4110(d) or, for that matter, any other limitation on review; that subject is not even mentioned. Finally, even if it could be assumed that the Labor Management Act authorizes an alternative grievance mechanism notwithstanding the finality provisions of 38 U.S.C. 4110(d), there would be no reason to conclude that the unique limitation upon review established by 32 U.S.C. 709(e), which places final authority in the hands of *state* officers, was similarly displaced (see page 4 note 4, *supra*).

3. Petitioner also contends that the FLRA's decision "should have been granted deference by the Court of Appeals" (Pet. 12). The court of appeals correctly observed, however, that because it was required to resolve an apparent conflict between the Labor-Management Act and the Technician Act and because the latter act is outside the FLRA's area of expertise, the court was "not obliged to defer to the FLRA's reading of the Technician Act, or to its resolution of the conflict between the two statutes" (Pet. App. 20a n.6).

Moreover, the question of statutory construction presented by petitioner is pending in three other courts of appeals: *California National Guard* v. *FLRA*, Nos. 81-7231 & 81-7336 (9th Cir.); *State of Nebraska Military Department, Office of the Adjutant General* v. *FLRA*, No. 82-1347 (8th Cir.); and *Indiana Air National Guard, Hulman Field, Terre Haute* v. *FLRA*, Nos. 82-1496 & 82-1544 (7th Cir.). There will be time enough for the Court to consider this question should a conflict among the circuits arise.[*]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

OCTOBER 1982

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[*]The Federal Labor Relations Authority believes that the court below erred insofar as it failed to defer to the agency's views. The FLRA agrees, however, that because of the absence of a conflict among the circuits certiorari is not warranted in this case. Should the instant petition nonetheless be granted the FLRA would seek to present its views in support of its decision before this Court.